2673

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 301.

LEO W. McCRAY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED JUNE 1, 1903.

(18,952.)

26737

(18,952.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 301.

LEO W. McCRAY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

INDEX.

	Original.	Print.
Caption	1	1
Petition	1	1
Answer	4	3
Demurrer	11	6
Judgment	12	7
Petition for writ of error	13	7
Assignment of errors	14	8
Order allowing writ of error	16	9
Bond on writ of error	17	9
Clerk's certificate	19	10
Writ of error	20	10
Citation	21	11
Service of citation	22	11

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 19, 1903.

1 THE UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, Western Division, }

At a stated term of the district court of the United States of America, within and for the western division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court rooms in the city of Cincinnati, Ohio, in said district, on the first Tuesday of April being the seventh day of that month, in the year of our Lord one thousand nine hundred and three and of the American Independence the one hundred and twenty-seventh.

Present: The Honorable Albert C. Thompson, district judge.

Among the proceedings had were the following, to wit:

THE UNITED STATES OF AMERICA }
vs. } No. 1810. For Money.
LEO W. McCRAY. }

Be it remembered, that heretofore, to-wit, came the plaintiff by its attorneys and filed in the clerk's office of said court its certain petition herein against the defendant Leo W. McCray—said petition is clothed in the words and figures following, to-wit:

Petition.

United States District Court, Southern District of Ohio, Western Division.

THE UNITED STATES OF AMERICA }
vs. } No. 1810.
LEO W. McCRAY. }

Now comes The United States, by William E. Bundy, United States attorney for the southern district of Ohio, and for its
2 cause of action says that on the twenty-fourth day of October 1902, the said defendant Leo W. McCray, was a retail dealer in oleomargerine, in the city of Cincinnati, southern district of Ohio, within the meaning of section 3, of the act of Congress of the United States of America, entitled "An act defining butter, also imposing a tax upon and regulating the manufacture, importation and exportation of oleomargerine," approved August 2, 1886, and the amendments thereto approved May 9, 1902. That said defendant had theretofore on the twenty-fifth day of July 1902, paid to the collector of internal revenue for the first collection district of Ohio, at his office in said city of Cincinnati, in the district aforesaid, the special tax of six dollars imposed and required of retail dealers of oleomargerine, by the provisions of section 3, of the act of August 2, 1886, as amended by section 2, of the act of May 9, 1902.

That said defendant did on said first mentioned date, to-wit, Oc-

tober 22, knowingly purchase and receive for sale in the course of his business, twenty pounds of oleomargerine, which said oleomargerine was purchased and received by said defendant from the Ohio Butterine Company, a corporation organized under and by virtue of the laws of West Virginia, and doing business as manufacturers of oleomargerine at Cincinnati, in said State, within the meaning of said act of Congress, as amended, and by which corporation said oleomargerine had been manufactured and prepared for sale in the course of its business.

3 Plaintiff further says that said oleomargerine so purchased and received for sale by said defendant as aforesaid, had not been stamped according to law, and which said defendant then and there well knew, ain that said oleomargerine, so manufactured, as aforesaid by the Ohio Butterine Company, was not free from artificial coloration and did contain additional coloring matter that caused it to look like butter of a certain share of yellow, and in violation of the provisions of section 8, of the act of August 2, 1886, as amended by section 3, of the act of May 9, 1902, had only been stamped by affixing internal revenue stamps of the value and at the rate of one fourth of one cent per pound, whereas the same should have been stamped according to law by affixing thereto internal revenue stamps of the value and at the rate of ten cents per pound; and said defendant became and is liable by reason of the premises, to a penalty of fifty dollars ($50.00) for such offense, under and by virtue of the provisions of section 11, of the act of August 2, 1886, as amended by section 3, of the act of May 9, 1902 and for which sum plaintiff prays judgment against said defendant, and for costs.

WILLIAM E. BUNDY,
Attorney for the United States.

STATE OF OHIO, }
Hamilton County, } *ss:*

William E. Bundy, being first duly sworn, says that he is the United States attorney for the southern district of Ohio, and that the facts stated in the foregoing petition are true, as he verily believes.

WILLIAM E. BUNDY.

Sworn to before me and subscribed in my presence this 27th day of October A. D. 1902.

[SEAL.] CLIFFORD WOODS,
Notary Public in and for Hamilton County, Ohio.

40c. due notary.

4 And afterwards, to-wit, on the 1st day of November A. D. 1902 an answer was filed in the clerk's office of said court, clothed in the words and figures following, to-wit:

Answer.

United States District Court, Southern District of Ohio, Western Division.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
LEO C. McCRAY, Defendant. } Answer.

Comes now the defendant, Leo C. McCray, and for answer to plaintiff's petition filed against him herein says:

First. He admits that on the 24th day of October 1902, he was a retail dealer in oleomargerine in the city of Cincinnati, in the southern district of Ohio, within the meaning of section 3, of the act of Congress, entitled "An act defining butter, also imposing a tax upon and regulating the manufacture, importation and exportation of oleomargerine," approved August 2, 1886, and the amendments thereto, approved May 9, 1902.

He admits that on the 25th day of July 1902, he paid to the collector of internal revenue for the first collection district of
5 Ohio, at his office in said city of Cincinnati, in the district aforesaid, the special tax of six dollars imposed and required of retail dealers in oleomargerine, by the provisions of section 3 of the act of August 2, 1886, as amended by section 2 of the act of May 9, 1902.

He admits that on the day alleged in the petition, to-wit, October 24th 1902, he purchased and received for sale in the course of his business 20 pounds of oleomargerine He admits that said oleomargerine was purchased and received by him from the Ohio Butterine Company, a corporation organized under and by virtue of the laws of West Virginia, and that said corpora-ion is now, and upon the date stated, was doing business as manufacturers of oleomargerine at Cincinnati, in the State of Ohio, within the meaning of the said act as amended, and that said corporation manufactured and prepared said oleomargerine for sale in the course of its business.

Defendant admits that said 20 pounds of oleomargerine so purchased and received by him from the Ohio Butterine Company, corporation as aforesaid, was of a certain shade of yellow color, and that said 20 pounds of oleomargerine had been stamped by affixing internal revenue stamps thereto of the value and at the rate on one fourth of one cent per pound; of all of which said defendant had full knowledge at the time.

And further answering, defendant denies each and every other allegation in said petition contained not herein specifically admitted.

6 *First Defense.*

Defendant says, that on the 24th day of October, 1902, being a retail dealer in oleomargerine as alleged in plaintiff's petition and hereinbefore admitted, and having paid the tax of six dollars im-

posed and required as hereinbefore alleged and admitted, he did, with full knowledge of the facts in relating thereto, purchase and receive for sale in the course of his business, and at his place of business in the city of Cincinnati, a package containing 20 pounds of oleomargerine from the said The Ohio Butterine Company, corporation as aforesaid; that said oleomargerine had been manufactured, compounded and prepared for sale by said corporation from a formula used by it, in the course of its business, and known as "high grade" and contained the following ingredients in the proportions given, and none other, that is to say; oleo oil, 20 pounds; neutral lard, 30 pounds; creamery butter, fifty pounds; milk and cream, 30 pounds; common salt, 7 pounds; that said oleomargerine, though containing only the ingredients named, was of a yellow color; that said yellow color in said finished article of oleomargerine was imparted to it by the use, employment and introduction in the manufacture thereof, as one of the constituent, elementary and necessary ingredients and parts thereof, of said 50 pounds of creamery butter; that said creamery butter was purchased in the open market and was the food product usually known as butter and which is made exclusively from milk or cream or both, as defined in section 1 of the act of Congress of August 2, 1886, to-wit "That for the purpose of this act the word "butter" shall be understood to mean the food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without coloring matter;" that said creamery butter so purchased and used in the manufacture of said oleomargarine was of a rich yellow color; that said color was derived from the use as an ingredient in its manufacture, of a substance known as Wells-Richardson's improved butter color, a substance universally used in the United States in the manufacture of butter, for the purpose of imparting a deep yellow color; that the same is neither injurious nor harmful for human consumption; that no additional or other coloring matter of any kind whatever was used or introduced into the finished product of oleomargarine by the said The Ohio Butterine Company; that the oleomargarine so purchased and received by the defendant was wholesome and nutritious, and free from any deleterious or injurious ingredient.

Defendant further says that the said The Ohio Butterine Company, manufacturers of said package of oleomargarine, from whom said package was purchased and received as aforesaid, had paid the special tax imposed and required by the acts of Congress relating to butter and oleomargarine and had otherwise conducted its business in compliance with all the requirements of said acts; that said package so purchased and received by the defendant as aforesaid had been packed, marked, stamped, branded and labeled, in compliance with all the provisions of said acts and with all the regulations thereunder prescribed by the Commissioner of Internal Revenue and the Secretary of the Treasury.

8 Defendant admits that said package of oleomargarine at the time he so purchased and received it, had been stamped by affixing internal revenue stamps thereto of the value and at the rate of one-fourth of a cent per pound, but denies that the same was not stamped according to law, or otherwise in violation of the provisions of section 8 of the act of August 2, 1886, as amended by section 3 of the act of May 9, 1902.

Defendant had full knowledge of the character and condition of said package of oleomargarine both as to the ingredients it contained and the amount of tax paid thereon.

Defendant further says that the cost of manufacture of the wholesale and nutritious oleomargarine like that contained in said package is such that it cannot be sold in competition with butter if the tax of ten cents per pound be imposed and paid.

The color of high grade oleomargarine manufactured as aforesaid, by the use and introduction of said creamery butter as one of the essential and necessary ingredients in the manufacture thereof, was of a light shade of yellow and not of the same deep yellow color possessed by said creamery butter. The natural color of butter at the time of the alleged offense, was of a lighter shade of yellow than that made in the spring season and nearly white, and of a lighter shade than the taste of butter consumers in the United States de-

9 mands. The butter of trade and commerce is artificially colored by the use of said Wells-Richardson's butter color or other similar substance in order to impart a deeper shade of yellow. There is little demand in the United States for either butter or oleomargarine which is not of the deep yellow shade of said spring butter.

Second Defense.

For a second defense to the petition this defendant says that the act of Congress relating to butter and oleomargarine of August 2, 1886, as amended by the act of Congress of May 9, 1902, in so far as it imposes a tax of ten cents per pound upon oleomargarine containing "artificial coloration that causes it to look like butter of any shade of yellow," and in so far as it authorizes the Commissioner of Internal Revenue "to decide what substances, extracts, mixtures or compounds which may be submitted for his inspection in contested cases are to be taxed under this act," and provides that "his decision in the matter of taxation under this act shall be final," is in contravention of the Constitution of the United States and of the amendments thereto and is illegal and void, for the following reasons, to-wit:

(1.) The act deprives the defendant of his property without due process of law.

(2.) The act is an unwarranted encroachment upon and in-

10 terference with the police powers reserved to the several States and to the people of the United States.

(3.) The act invests an inferior executive officer with the power

finally and arbitrarily to determine an essentially judicial question concerning vast property rights.

(4.) The act so arbitrarily discriminates against oleomargarine in favor of butter as to destroy the oleomargarine industry for the benefit of the butter industry in the United States, and is thus repugnant to those fundamental principles of equality and justice which are inherent in the Constitution of the United States.

Wherefore, the defendant, having fully answered, prays to be hence dismissed with his costs herein expended.

FORAKER, OUTCALT, GRANGER & PRIOR,
Attorneys for Defendant.

UNITED STATES OF AMERICA, }
State of Ohio, Hamilton County, } *ss:*

Leo W. McCray being first duly sworn says he is the defendant above named, and that the facts stated and allegations made in the foregoing answer, are true as he verily believes.

LEO W. McCRAY.

Sworn to before me and subscribed in my presence this 31st day of October 1902.

[SEAL.] W. A. RINCKHOFF,
Notary Public, Hamilton County, Ohio.

40c. due notary.

11 And afterwards, to-wit, on the 16th day of January A. D. 1903 a demurrer was filed in the clerk's office of said court, clothed in the words and figures following, to-wit:

Demurrer.

United States District Court, Southern District of Ohio, Western Division.

THE UNITED STATES OF AMERICA, Plaintiff, }
vs. } No. 1810. Demurrer.
LEO W. MCCRAY, Defendant. }

Now comes the United States of America, by William E. Bundy, United States attorney for the southern district of Ohio, and demurs to the "first defense" as set out in the answer of the defendant, for the reason that said defense does not state facts sufficient in law to constitute a defense.

And now comes the United States of America, by William E. Bundy, United States attorney for the southern district of Ohio, and demurs to the "second defense" set out in the answer of defendant, for the reason that it does not state facts sufficient in law to constitute a defense.

WILLIAM E. BUNDY,
U. S. Attorney, S. D. O.

12 And afterwards, to-wit, on the 18th day of May A. D. 1903 an entry was made upon the journal of said court, clothed in the words and figures following, to-wit:

Journal 8, page 382.

This cause coming on to be heard upon the demurrer of the United States of America, to the answer of defendant, and upon the arguments of counsel the court doth find that said demurrer is well taken, and doth hereby sustain said demurrer.

And it appearing to the court that the defendant does not wish to plead further, the court doth find that the allegations of the petition of plaintiff are true, doth find that plaintiff is therefore entitled to judgment against defendant for a penalty of $50.00 and the costs of this action.

Wherefore, it is ordered and adjudged that plaintiff recover of defendant said sum of $50.00, as penalty and the costs of this action, taxed at $—.

To all of which ruling of the court, and judgment hereby rendered, the defendant doth except.

And afterwards, to-wit on the 21st day of May A. D. 1903, a petition for writ of error was filed in the clerk's office of said court, clothed in the words and figures following, to-wit.

Petition for Writ of Error.

13 In the District Court of the United States for the Southern District of Ohio, Western Division.

THE UNITED STATES OF AMERICA, Plaintiff, vs. LEO W. MCCRAY, Defendant.	No. 1810. Petition for Writ of Error.

And now comes Leo W. McCray, defendant herein, and says that on or about the 13th day of May 1903, this court entered judgment herein in favor of the plaintiff and against this defendant, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in this behalf to the United States Supreme Court, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Supreme Court.

MILLER OUTCALT,
C. E. PRIOR,
Attorneys for Defendant.

And afterwards, to-wit, on the 21st day of May A. D. 1903, the following assignment of errors was filed in the clerk's office of said court, clothed in words and figures following, to-wit—

Assignment of Errors.

14 In the District Court of the United States for the Southern District of Ohio, Western Division.

No. 1810.

THE UNITED STATES OF AMERICA, Plaintiff, vs. LEO McCRAY, Defendant. | No. 1810. Assignment of Errors.

The defendant in this action in connection with his petition for a writ of error, makes the following assignment of errors which he avers occurred upon the trial of the cause, to-wit:

1. The court erred in sustaining the demurrer of the plaintiff to the answer of the defendant filed herein as appears of record herein.

11. The act of Congress approved August 2nd, 1886, entitled "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine," as amended by the act of Congress, approved May 9th, 1902, entitled "An act to make oleomargarine and other imitation dairy products subject to the laws of any State or Territory or the District of Columbia into which they are transported, and to change the tax on oleomargarine, and to impose a tax, provide for the inspection, and regulate the manufacture and sale of certain dairy products,

15 and to amend an act entitled 'An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine,' approved August 2nd, 1886," under which this action is instituted and prosecuted, is in contravention of the Constitution of the United States of America and of the amendments thereto, and is illegal and void for the following reasons, to-wit:

(*a*) The act deprives the defendant of his property without due process of law;

(*b*) The act is an unwarranted encroachment upon and an interference with the police powers reserved to the several States and to the people of the United States;

(*c*) The act so arbitrarily discriminates against oleomargarine in favor of butter as to destroy the oleomargarine industry for the benefit of the butter industry in the United States, and is thus repugnant to those fundamental principles of equality and justice which are inherent in the Constitution of the United States.

III. If said act be not in contravention of the Constitution of the United States of America, then said court erred in holding that oleomargarine which contains no other artificial coloration than

that imparted to it by the use of butter which itself contains coloring matter and which therefore causes said oleomargarine to look like butter of a shade of yellow, is subject to a tax of ten cents per pound instead of a tax of one-fourth of one cent per pound.

IV. The court erred in entering judgment in favor of the plaintiff and against this defendant.

MILLER OUTCALT,
C. E. PRIOR,
Att'ys for Def't.

16 And afterwards, to-wit, on the 20th day of May A. D. 1903, the following entry was made upon the journal of said court, clothed in the words and figures following, to-wit.

J. 8, page 383.

THE UNITED STATES OF AMERICA
vs.
LEO W. McCRAY.

This day came the defendant and presented his petition for the allowance of a writ of error, and an assignment of errors ac-company-ing the same, which petition upon consideration of the court is hereby allowed, and the court allows a writ of error to the U. S. Supreme Court upon the filing of a bond in the sum of $250.00, with good and sufficient security to be approved by the court.

17 And afterwards, to-wit, 22nd day of Ma- A. D. 1903, a bond was filed in the clerk's office of said court, clothed in the words and figures following, to-wit:

Bond.

District Court of the United States, Southern District of Ohio, Western Division.

THE UNITED STATES
vs.
LEO W. McCRAY.

Know all men by these presents: That we, Leo W. McCray, as principal and the American Bonding Company of Baltimore, as surety, are held and firmly bound unto the United States of America, in the sum of two hundred and fifty dollars to be paid to the said The United States of America. To which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals. Dated this 22nd day of May 1903.

Whereas, the above named Leo W. McCray, has taken out a writ of error to the Supreme Court of the United States of America to

reverse the judgment rendered in the above entitled action by the district court of the United States for the southern district of Ohio, western division.

Now therefore, the condition of this obligation is such, that if the above named Leo W. McCray shall prosecute his said writ of error to effect and answer all costs if he shall fail to make good his
18 plea, then this obligation to be void; otherwise to remain in full force and virtue.

LEO W. McCRAY, [SEAL.]
AMERICAN BONDING COMPANY OF BALTIMORE,
By JOHN DOYLE, *Vice Pres't.* [SEAL.]
Attest: THORPE MILES, *Assistant Sec'y.*

Sealed and delivered in presence of—
ALFRED FAHRENBRUCK.
D. F. JAUNLD.

The above security is approved.

A. C. THOMPSON,
District Judge of the United States, S. D. O.

19 THE UNITED STATES OF AMERICA, }
Southern District of Ohio, Western Division, } *ss:*

I, Benjamin R. Cowen, clerk of the district court of the United States of America, within and for the division and district aforesaid, do hereby certify that the foregoing is a full, true and correct transcript of the proceedings had by and before said court and as the same appears of record and on file in the clerk's office of said court, and further certify that no opinion was filed by the court.

Seal United States District Court, Southern Dis. Ohio.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at the city of Cincinnati, Ohio, this 23rd day of May A. D. 1903.

B. R. COWEN, *Clerk,*
By JAMES W. F. COWEN,
Deputy Clerk.

20 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judge of the district court of the United States for the southern district of Ohio, Greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between The United States of America and Leo W. McCray a manifest error hath happened to the great damage of the said Leo W. McCray as by his complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command

you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington within thirty days from this date in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 23d day of May, 1903, in the year of our Lord one thousand nine hundred and three.

[Seal United States District Court, Southern Dis. Ohio.]

B. R. COWEN,
Clerk of the Circuit Court of the U. S., S. D. O.

[Endorsed:] United States district court, southern district of Ohio W. D. No. 1018. The United States of America *vs.* Leo W. McCray. Writ of error. Filed May 23 1903. B. R. Cowen, clerk.

21 THE UNITED STATES OF AMERICA, *ss:*

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, within thirty days from this date *of*, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, wherein Leo W. McCray is plaintiff, and you are defendant, in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice be done to the parties in that behalf.

Witness, the Honorable Albert C. Thompson, district judge of the United States, this 23" day of May in the year of our Lord one thousand nine hundred and three.

A. C. THOMPSON,
Judge U. S. District Court, Southern District of Ohio.

22 [Endorsed:] Marshal's criminal docket No. 2398 United States district court, southern district of Ohio W. D. No. 1018 The United States of America *vs.* Leo W. McCray. Citation to defendant in error. Filed May 25 1903 B. R. Cowen clerk. Error bond filed.

CINCINNATI, OHIO, *May* 25, 1903.

Received this writ on the 25th day of May 1903, and on the same day served the within named The United States of America by handing a true copy of this writ, with all the endorsements thereon to William E. Bundy, United States attorney for the southern district of Ohio, at Cincinnati.

Fees.

Copy	50
Service	2.00
	$2.50

V. F. FAGIN,
U. S. Marshal, S. D. O.

23 [Endorsed:] No. 1810. United States district court, southern district of Ohio, western division. Leo W. McCray *vs.* The United States of America. Transcript. —— ——, attorneys.

Endorsed on cover: File No. 18,952. S. Ohio D. C. U. S. Term No. 301. Leo W. McCray, plaintiff in error, *vs.* The United States. Filed June 1st, 1903.

OCT 26 1903
JAMES H. McKENNEY, Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

AUGUST CLIFF, *Plaintiff in error,* *vs.* THE UNITED STATES. In error to the District Court of the United States for the Northern District of Illinois.	No. 614, October Term, 1902. No. 221, October Term, 1903.
FREDERICK J. SCHICK, *Plaintiff in error,* *vs.* THE UNITED STATES. In error to the District Court of the United States for the Northern District of Illinois.	No. 615, October Term, 1902. No. 222, October Term, 1903.
WILLIAM BROADWELL, *Plaintiff in error,* *vs.* THE UNITED STATES. In error to the District Court of the United States for the Northern District of Illinois.	No. 616, October Term, 1902. No. 223, October Term, 1903.
LEO W. MCCRAY, *Plaintiff in error,* *vs.* THE UNITED STATES. In error to the District Court of the United States for the Southern District of Ohio.	No. 301, October Term, 1903.

BRIEF FOR PLAINTIFFS IN ERROR.

WILLIAM D. GUTHRIE,
MILLER OUTCALT,
CHARLES E. PRIOR,
FRANCIS J. KEARFUL,
DELAVAN B. COLE,
CHARLES C. CARNAHAN,
Of counsel.

Washington, October Term, 1903.

[18,842, 18,843, 18,844, 18,952.]

OLEOMARGARINE TAX CASES.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

AUGUST CLIFF, *Plaintiff in error,* vs. THE UNITED STATES. In error to the District Court of the United States for the Northern District of Illinois.	No. 614, October Term, 1902. No. 221, October Term, 1903.
FREDERICK J. SCHICK, *Plaintiff in error,* vs. THE UNITED STATES. In error to the District Court of the United States for the Northern District of Illinois.	No. 615, October Term, 1902. No. 222, October Term, 1903.
WILLIAM BROADWELL, *Plaintiff in error,* vs. THE UNITED STATES. In error to the District Court of the United States for the Northern District of Illinois.	No. 616, October Term, 1902. No. 223, October Term, 1903.
LEO W. MCCRAY, *Plaintiff in error,* vs. THE UNITED STATES. In error to the District Court of the United States for the Southern District of Ohio.	No. 301, October Term, 1903.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF FACTS.

The above entitled cases draw in question the constitutionality of certain provisions of the act of Congress commonly called the "Oleomargarine Act," and en-

titled "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine," approved August 2, 1886, as supplemented by section 41 of the act of October 1, 1890, and as amended by the act of May 9, 1902 (24 Stat. 209, c. 840; 26 Stat. 621, c. 1244, § 41; 32 Stat. 193, c. 784), on the ground that they interfere with the reserved power of the States to regulate their internal commerce, deprive the individual of liberty and property without due process of law, and confer final judicial power upon an administrative officer.

The plaintiffs in error *Cliff*, *Schick* and *Broadwell* were prosecuted by information in the District Court of the United States for the northern district of Illinois (*Ex parte Wilson*, 114 U. S. 417, 425; *Lees* v. *United States*, 150 U. S. 476, 479) for the offense of having purchased or received for sale oleomargarine which had not been "stamped according to law" under section 11 of the act. In the case of *McCray*, the government instituted in the District Court of the United States for the southern district of Ohio a civil suit under the same section of the act, for the recovery of the penalty therein provided. *Helwig* v. *United States*, 188 U. S. 605, 610.

The title of the amendatory act defines the general object of the legislation as follows (32 Stat. pt. 1, p. 193):

> "An Act to make oleomargarine and other imitation dairy products subject to the laws of any State, or Territory or the District of Columbia into which they are transported, and to change the tax on oleomargarine, and to impose a tax, provide for the inspection, and regulate the manufacture and sale of certain dairy products, and to amend an Act entitled 'An Act defining butter, also imposing a tax upon and regulating the manufacture, sale, im-

portation, and exportation of oleomargarine,' approved August second, eighteen hundred and eighty-six."

The act, as amended, consists of 21 sections. Section 1 defines butter as follows (24 Stat. 209):

> "That for the purposes of this act the word 'butter' shall be understood to mean the food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and *with or without additional coloring matter.*"

Section 2 defines oleomargarine as follows (24 Stat. 209):

> "That for the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine,' namely: All substances heretofore known as oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef-fat, suet, lard, lard-oil, vegetable-oil, *annotto, and other coloring matter,* intestinal fat, and offal fat, *made in imitation or semblance of butter, or when so made, calculated or intended to be sold as butter or for butter.*"

Section 3 imposes special taxes on manufacturers, wholesale dealers and retail dealers in oleomargarine, and section 4 prescribes heavy penalties for their nonpayment. Section 5 provides for regulation of the business of manufacturing oleomargarine by the Commissioner of Internal Revenue, places the conduct of such business under "surveillance of officers and agents" of the Commissioner, and requires each manufacturer to give a bond in the penal sum of not less than five thousand dollars, which "may be increased

from time to time, and additional sureties required at the discretion of the collector, or under instructions of the Commissioner of Internal Revenue." Section 6 provides for the packing, marking, stamping and branding of oleomargarine by manufacturers, as prescribed by regulations of the Commissioner with the approval of the Secretary of the Treasury, and provides penalties for the enforcement of such regulations. Section 7 requires the manufacturer of oleomargarine to affix to each package of the article sold or offered for sale the usual internal revenue label containing a caution not to use the same package or the same label thereon again.

Section 8, as amended by section 3 of the act of May 9, 1902, imposes the tax in question in the following language (32 Stat. pt. 1, p. 194):

> "That upon oleomargarine which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected a tax of ten cents per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound: *Provided, When oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow said tax shall be one-fourth of one cent per pound.*"

Section 9 provides for assessment of taxes on oleomargarine which has been sold or removed for sale "without the use of the proper stamps." Section 10 imposes a tax of fifteen cents per pound upon imported oleomargarine in addition to the duty. Section 11 prescribes the penalty judicially imposed in the cases at bar, as follows (24 Stat. 211):

> "That every person who knowingly purchases or receives for sale any oleomargarine which has

not been branded or stamped according to law shall be liable to a penalty of fifty dollars for each such offense."

Section 12 imposes a penalty for purchasing or receiving for sale any oleomargarine from any manufacturer who has not paid the special tax. Section 13 provides for the destruction of stamps on empty packages. Section 14 provides for the employment of chemists and microscopists by the Commissioner of Internal Revenue, for decision by said Commissioner as to whether any oleomargarine is deleterious to health, for an appeal from such decision to a board "composed of the Surgeon-General of the Army, the Surgeon-General of the Navy, and the Commissioner of Agriculture," whose decision shall be final, and also confers power on the Commissioner of Internal Revenue as follows (24 Stat. 212):

> "And such Commissioner is authorized to decide what substances, extracts, mixtures, or compounds which may be submitted for his inspection in contested cases are to be taxed under this act; and *his decision in matters of taxation under this act shall be final.*"

Section 15 provides for forfeiture to the United States of all oleomargarine found to be deleterious to health, or not stamped or marked as provided by the act, and also forbids the removal or defacing of stamps on packages of oleomargarine. Section 16 provides for removal of oleomargarine for export without tax. Section 17 punishes any manufacturer who "defrauds, or attempts to defraud, the United States of the tax on the oleomargarine produced by him, or any part thereof," with forfeiture of his factory, manufacturing apparatus and all oleomargarine

and raw material found on the premises, and by fine not exceeding five thousand dollars and imprisonment for not more than three years. Section 18 punishes by a penalty of one thousand dollars, and forfeiture of all oleomargarine owned by the offender if he be a manufacturer, all failures to comply with the act not otherwise punished. Section 19 provides "that all fines, penalties and forfeitures imposed by this act may be recovered in any court of competent jurisdiction." Section 20 provides "that the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may make all needful regulations for the carrying into effect of this act." Section 21 of the original act provides for its going into effect ninety days after its passage, and the act, as amended (under the last section of the act of May 9, 1902), went into effect on July 1, 1902.

On the trial of each case, it was contended by the defendant that, in so far as this act imposes a tax of ten cents per pound on oleomargarine containing "artificial coloration that causes it to look like butter of any shade of yellow," it was in contravention of the Constitution of the United States and the amendments thereto, because it constituted an invasion of the powers reserved to the several States and deprived him and the oleomargarine manufacturers and dealers in the United States of liberty and property without due process of law. In the *Cliff* and *McCray* cases it was contended also that the act was unconstitutional in so far as it authorizes the Commissioner of Internal Revenue "to decide what substances, extracts, mixtures, or compounds which may be submitted for his inspection in con-

tested cases are to be taxed under this act," and provides "that his decision in matters of taxation under this act shall be final," on the ground that it delegates to an inferior administrative officer the power finally to determine an essentially judicial question. Notwithstanding these contentions, judgment was rendered in favor of the government imposing the statutory penalty of fifty dollars in each case (*Cliff* record, pp. 22–24; *Schick* record, pp. 19–21; *Broadwell* record, pp. 19–21; *McCray* record, pp. 5–7). Thereupon, the cases were brought direct to this court by writ of error under authority of section 5 of the judiciary act of March 3, 1891, as involving the construction or application of the Constitution of the United States and also as cases in which the constitutionality of a law of the United States was drawn in question. 26 Stat. 827, c. 517; *Motes* v. *United States*, 178 U. S. 458, 466; *Fairbank* v. *United States*, 181 U. S. 283, 284.

In the *Cliff* case, the Government showed that the defendant was a general grocer and retail dealer in oleomargarine in Chicago; that on December 22, 1902, he had in his possession a ten pound package of oleomargarine of a color resembling June butter and bearing a tax-paid stamp at the rate of one-fourth of one cent per pound; that the article was composed of oleo oil, neutral lard, cotton-seed oil, milk, common salt and palm oil; that the color of June butter was imparted to it by the palm oil it contained; that the oleomargarine had been manufactured in the month of December, 1902, by Wm. J. Moxley, Incorporated, factory No. 5, at the corner of Clinton and Randolph Streets,

in the City of Chicago, State of Illinois; that the package was put up, marked, stamped and branded in every respect in accordance with the acts of Congress relating to oleomargarine and the regulations of the Secretary of the Treasury and the Commissioner of Internal Revenue except that it bore only a tax-paid stamp of one-fourth of one cent per pound, and that the defendant admitted to the collector at that time that he purchased and received from the Moxley Company the oleomargarine in question for the purpose of sale as oleomargarine, knowing its character and ingredients and the amount of tax paid thereon (*Cliff* record, p. 8).

In the *Schick* case substantially the same showing was made, except that it appeared that the package of oleomargarine involved in that case admittedly contained 'artificial coloration,' namely, Wells-Richardson's Improved Butter Color, and that the package bore only a tax-paid stamp at the rate of two cents per pound (*Schick* record, p. 8).

In the *Broadwell* case the same showing as in the *Schick* case was made, except that the package of oleomargarine bore no stamp and no tax had been paid on it (*Broadwell* record, p. 8).

The operation and effect of the act were shown by undisputed evidence offered and adduced on behalf of the defendant in each case, as follows:

Oleomargarine is designed to be used as a substitute for butter and to that end is colored as butter is colored. There is substantially no difference between yellow oleomargarine and yellow butter. They are identical as to the chemical elements of each, except only a slight difference in proportion. They each con-

tain olein, stearin, palmatin, butyrin and coloring matter. The first three elements olein, stearin and palmatin, are the principal components, are exactly the same in oleomargarine and butter, and constitute more than 90 per cent. of the finished product in both cases. The amount of butyrin varies slightly, being about six per cent. in good butter, and somewhat less in oleomargarine, depending upon the amount of milk, cream or butter used in its manufacture, as butyrin is found only in milk, cream or butter. The amount of coloring matter in butter varies at different periods and according to the condition and food of the cows. It is universally colored throughout the year to a uniform shade of yellow, but requires more color in the winter, when it is white, than in the spring, when it has some natural color, especially if the cows have been fed on green grass or clover. There is nothing, however, in these slight differences which renders butter more wholesome or digestible than oleomargarine as an article of food, and the coloring matter used in both cases is harmless. Yellow oleomargarine and yellow butter are used for the same identical purpose, and compete with each other in the market. The reason for coloring these products is the same in both cases: because the consumers demand it. A necessary element of the marketability of each is a certain shade of yellow which must be imparted to the product before it can be sold. There is no market either for uncolored oleomargarine or uncolored butter, except, in the case of oleomargarine, as a substitute for lard, and, in the case of butter, a small quantity of sweet unsalted butter is sold to supply the Jewish settlements. It costs less to produce

oleomargarine than it does to produce butter, and to this extent, oleomargarine successfully competes with and tends to cheapen butter; but this difference in cost is not great enough to enable the colored oleomargarine to be sold after paying the tax of ten cents per pound except occasionally when the price of butter is abnormally high (*Cliff* record, pp. 8–21; *Schick* record, pp. 8–19; *Broadwell* record, pp. 8–19).

Prior to July 1, 1902, when the act of May 9, 1902, went into effect, the business of producing and selling yellow oleomargarine had been able to compete with the yellow butter industry to a very considerable extent. It was shown that the Moxley plant, at which the packages involved in these cases were manufactured, had been in operation since 1884, supplying the trade in various parts of the United States with yellow oleomargarine designed to be used as a substitute for butter, and had grown to a capacity of between three and four million pounds per month. Prior to July 1, 1902, the entire output of this factory was all artificially colored as butter is colored. Thereafter, it could not be manufactured and sold at a profit after paying the tax of ten cents per pound, and for the first five months none of the colored article was produced or sold. In December, 1902, owing to the abnormally high price of butter, the Moxley Company was enabled to sell 37,594 pounds of colored oleomargarine, as compared with an output of about 2,000,000 pounds per month prior to July 1; but when butter fell again to its normal price, oleomargarine bearing the tax of ten cents per pound was practically unable to compete with it. The uncolored product, so far as could be ascertained, was sold for cook-

ing purposes, but only in comparatively small and uncertain quantities, because the relative cost of production was such that oleomargarine could not ordinarily compete with lard, although more desirable than lard for cooking purposes (*Cliff* record, pp. 18–20). Amundsen, a retail dealer in Chicago, who obtained his supplies from this factory, had worked up a business among the laboring classes of Chicago amounting to sales of 2,600 pounds per week. The customers "knew that it was oleomargarine and not butter and they bought it because it was cheaper than butter" (*ib.* p. 17). But when the ten cent tax was to be paid it was cheaper to buy butter, and they would not have the uncolored article. As a consequence, to quote the witness, "every customer I had quit" (*ib.*). Thereafter, he supplied a part of the trade with butter for table use, selling white oleomargarine only for cooking purposes (*ib.* pp. 16–17). Izard, a restaurant proprietor in Chicago, furnished yellow oleomargarine almost exclusively to his patrons, who had no objection to it so long as it had the proper color. After July 1, 1902, he could not use it because it was white and the addition of ten cents per pound to the price of colored oleomargarine resulted in the use by him of colored butter almost exclusively. The uncolored oleomargarine he could use only for cooking in place of lard (*ib.* pp. 17–18).

In the *Cliff* and *McCray* cases, where the package was tax-paid at the rate of one-fourth of one cent per pound, there was an additional question as to whether the package contained 'artificial' coloration within the meaning of section 8 of the act by reason of

the admixture of palm oil or colored butter. Upon this issue also the facts were undisputed. In the *Cliff* case, the government showed that the article was of the color of June butter, and that this color was imparted to it by the admixture of palm oil in its manufacture (*Cliff* record, p. 8). The defendant showed by competent testimony that palm oil is a vegetable oil derived from the fruit of a certain kind of palm which grows in East Africa, that it is a digestible and edible oil, containing all the chemical constituents of butter, except butyrin, that it is used by the natives of the country where it is produced as an article of food, that it is reddish-yellow in appearance and a very small proportion of it is sufficient to produce what is considered a desirable color in oleomargarine, that there is little, if any, difference between the taste of oleomargarine made in this way and the taste of butter, that it is quite as digestible as butter and is very cheap, that the oleomargarine thus produced is substantially the same product as good butter, and that the nature of palm oil is such that, by the process of refining, its intense color may be partially eliminated, thus rendering its use in considerable quantities desirable in the manufacture of oleomargarine apart from its yellow color (*ib.* pp. 10–13). These facts being wholly undisputed, the conviction was based on the assumption that the question thus presented had been foreclosed by the final decision of the Commissioner of Internal Revenue, who had ruled that palm oil in oleomargarine does constitute 'artificial' coloration (*ib.* pp. 9, 10), and had instructed the prosecuting witness, a Deputy Collector of Internal Revenue,

that its use would subject the product to the tax of ten cents per pound (*ib.* p. 8).

In the *McCray* case the government alleged in its complaint that the defendant had purchased for sale as a retail dealer a package of oleomargarine containing "coloring matter that caused it to look like butter of a certain shade of yellow," and bearing a tax-paid stamp at the rate of only one-fourth of one cent per pound (*McCray* record, p. 2). These allegations were admitted by the defendant, who averred by way of defense that the coloring matter contained in the article was that contained in the creamery butter used by the manufacturer of the oleomargarine as one of its elementary and necessary ingredients, according to a formula used in the course of business, which creamery butter contained Wells-Richardson's improved butter color, a harmless substance, universally used in the United States in the manufacture of butter, for the purpose of imparting a deep yellow color, that said creamery butter was purchased in the open market for said purpose, that no additional or other coloring matter of any kind whatsoever was used or introduced into said oleomargarine, that said oleomargarine contained nothing but oleo oil, neutral lard, creamery butter, milk, cream and common salt, and was wholesome and nutritious and free from any deleterious or injurious ingredient; that said package had been "packed, marked, stamped, branded and labeled, in compliance with all the provisions of said acts and with all the regulations thereunder prescribed by the Commissioner of Internal Revenue and the Secretary of the Treasury," that "the cost of manufacture of the wholesome and

nutritious oleomargarine like that contained in said package is such that it cannot be sold in competition with butter if the tax of ten cents per pound be imposed and paid," and that there is little demand in the United States for either uncolored butter or uncolored oleomargarine (*ib.* pp. 3–5). These facts were admitted by the demurrer of the government which the court sustained (*ib.* pp. 6, 7).

The historical facts concerning oleomargarine will be found in Encyc. Brit., vol. 17, p. 760; Century Dict. & Cyc., vol. 5, p. 4101; Oleomargarine Regulations, U. S. Int. Rev., June, 1902, pp. 11–15; "The Oleomargarine Bill" (Gov. Print., 1901), *resumé* pp. 815–885; *People* v. *Marx*, 99 N. Y. 377, 382–383; *People* v. *Arensberg*, 105 N. Y. 123, 129–132; *People ex rel. Moxley* v. *Pease*, 30 Chicago Leg. News, No. 34; *Ex parte Scott*, 66 Fed. Rep. 45, 48; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 8–12; *In re Brundage*, 96 Fed. Rep. 963, 965.

Shortly after the Franco-Prussian war of 1870–1871, the French government decided that it was of the utmost importance that some cheap and wholesome substitute for butter should be discovered for the relief of the poor in the great cities and manufacturing centers who were unable to obtain butter. To that end a prize was offered to scientists, and the result was the invention of oleomargarine by M. Mege-Mouries (Encyc. Brit., Vol. 17, p. 760). This invention was immediately recognized and hailed as a boon to humanity, and soon sprang into use all over the world. It was at first made by treating pure beef fat by a certain process. Afterwards, in order to make the product more wholesome and

digestible as well as more palatable, various modifications in the process were from time to time introduced. The present method is to take selected fat of the steer, reduce it to oil, which is called 'oleo oil,' and then mix and work this oleo oil with natural lard, milk, cream and butter. Oleomargarine furnishes a very valuable by-product of the slaughter houses and packing establishments, and the effect has been to utilize what had before gone to waste, to increase the value of beef cattle and to decrease the price of butter. It has practically no commercial use or value, except as a cheap and wholesome substitute for butter and as such it necessarily competes with butter. If it is not allowed to be used as a substitute for or to compete with butter, the discovery is of no practical utility to mankind.

The commercial character of oleomargarine is described by Mr. Justice Peckham in the case of *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 8–12. The growth and extent of the use of oleomargarine in every civilized country is part of the common history of the times. The official records of the United States government show that the output during the twelve months ending June 30, 1900, amounted to 107,045,028 pounds, an average of 8,920,419 pounds per month, and that the revenue collections from oleomargarine in 1900 were $2,543,785.[1] On the other hand, the same records show the yearly sales of butter to have been 1,492,699,143 pounds;[2] so that the production of oleomargarine was only about seven per cent. of the amount of butter manufactured. As oleomargarine was invented and is

[1] Senate Doc. 168, 57th Cong., 1st session.

[2] Twelfth Census, 1900, vol. IX, Manufactures, pt. III, p. 517.

used commercially almost wholly as a substitute for butter and in competition with butter, it is desirable that its flavor and color should be similar to the flavor and color of butter, and hence the necessity for the use of flavoring and coloring matter, being the same as that used to color and flavor butter. Oleomargarine is colored yellow for exactly the same reason that butter is colored, namely, to meet the taste and demand of the public.

In 1886 Congress determined to tax oleomargarine and regulate its manufacture. The act of August 2, 1886, contained a definition of oleomargarine and of butter which recognized the use of coloring matter as an element in the manufacture of both articles. It treated all oleomargarine, no matter how colored, as one article for the purposes of taxation. The tax then imposed was at the rate of two cents per pound, and between November 1, 1886, and the close of the year 1901 more than $21,000,000 had been paid as taxes under this law. The act of Congress of May 9, 1902, does not change these definitions, but oleomargarine is classified according to color, and that "free from artificial coloration that causes it to look like butter of any shade of yellow" is taxed at one-fourth of one cent per pound, while that containing "artificial coloration that causes it to look like butter of any shade of yellow," is taxed at ten cents per pound, or *forty* times as much.

The discussion in this brief will proceed upon the face of the act of Congress in question and its undisputed practical operation and effect, which is to prohibit the sale of yellow oleomargarine. No quotations will

be made from the debates in which the real purpose of the enactment may have been declared by individual members, because counsel are apprehensive that such debates are not admissible. *Knowlton* v. *Moore*, 178 U. S. 41, 72. Under the decisions, the question is most perplexing. The court frequently does refer to these debates for information, and yet has often declared that they are not admissible to show purpose or motive or to determine the intention of particular legislation. The true rule appears to be that debates may be referred to in order to show the occasion for the legislation and the circumstances surrounding its enactment, but not in order to ascertain the individual motives or purposes of its promoters or to control the meaning of the language used. As, in the present cases, reference to the debates would involve a showing of individual motives and purposes calculated, as it might be charged, to excite prejudice and sympathy, which counsel are not satisfied constitute proper elements in the strictly legal judgment which the court is required to render, they will not be referred to in argument. It is enough to say that the supposed "exigencies which led to the passage of the act" and "the reasons for fixing the duty at this amount" may be ascertained by examining the debates.[1] If the court shall reach the conclusion that it will consult these evidences of legislative intent and purpose, the references in the margin may be of convenience.[2]

[1] *American Net & Twine Co.* v. *Worthington*, 141 U. S. 468, 474; *Aldridge* v. *Williams*, 3 How. 9, 24; *Jennison* v. *Kirk*, 98 U. S. 453, 459; *Platt* v. *Union Pacific R. R. Co.*, 99 U. S. 48, 64. See also *Holy Trinity Church* v. *United States*, 143 U. S. 457, 463; *The Delaware*, 161 U. S. 459, 472; *Dunlap* v. *United States*, 173 U. S. 65, 75. *United States* v. *Freight Association*, 166 U. S. 290, 318, 360.

[2] Congressional Record, 57th Cong., 1st sess., vol. 35, part 2, pp. 1251 *et seq.*, 1299, 1310, 1544; part 3, pp. 3192, 3195, 3196, 3246, 3270-3274, 3280, 3322, 3452, 3458, 3466, 3467, 3499-3514, 3556, 3595-3597.

ASSIGNMENT OF ERRORS.

Error in refusing to hold that the provisions of the act of Congress of August 2, 1886, as amended by the act of Congress of May 9, 1902, were in contravention of the Constitution of the United States and the amendments thereto, in that—

(1) They constitute an encroachment upon and interference with the powers reserved to the several States;

(2) They deprive the plaintiffs in error of liberty and property without due process of law;

(3) They invest an administrative officer with the power finally to determine essentially judicial questions.

Error in striking out and refusing to consider proper evidence offered and received on behalf of the defendants below in the first three cases, tending to prove:

(1) That oleomargarine is a substitute for and competes with butter, that the market demand for and commercial value of both butter and oleomargarine require that they shall have a certain shade of yellow during all seasons of the year, and that there is practically no market either for uncolored butter or uncolored oleomargarine;

(2) That the cost of production of oleomargarine is such that, after payment of a tax of ten cents per pound thereon, it cannot be sold.

The questions presented under these assignments of error may be classified for the purposes of argument under the following heads, viz.:

I. The power of Congress to levy excise taxes on manufactures (pp. 19–28).

II. The internal commerce of the States and the exercise of the taxing power by Congress (pp. 28–52).

III. The restrictions upon the taxing power contained in the Fifth Amendment (pp. 52–70).

IV. The provision of section 14 of the act conferring judicial power upon the Commissioner of Internal Revenue (pp. 70–75).

V. Effect of the invalid amendment upon the original act (pp. 75–76).

I.

THE POWER OF CONGRESS TO LEVY EXCISE TAXES ON MANUFACTURES.

The Constitution of the United States grants to Congress (Art. I, sec. 8) "the power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States," and directs that capitation and other direct taxes shall be laid in proportion to the census or enumeration, and that duties, imposts and excises shall be uniform throughout the United States. Subject to these two directions, which are not strictly limitations of power but rules prescribing the mode in which the power shall be exercised,[1] the only express limitation in the Constitution, as originally adopted, was that no "tax or duty shall be laid on articles exported from any State."[2]

An examination of the debates in the various conventions to which the Constitution was submitted for ratification and of the writings of that time will show that the subject of federal taxation and the danger of oppression from its exercise was discussed as much as any other fea-

[1] Chief Justice Chase in *Veazie Bank* v. *Fenno*, 8 Wall. 533, at p. 541.
[2] Art. I, sec. 9; *Fairbank* v. *United States*, 181 U. S. 283, 290.

ture, and that some of the States apprehended particular injury from the power to levy excises on manufactures and commodities. It was particularly objected by the opponents of the Constitution that Congress was given power to pass any law which it thought necessary and proper in aid of the powers granted to it. The answer of Hamilton in the *Federalist* was that Congress could not by its mere declaration make that necessary and proper to the execution of its powers which, in its essence, was not necessary and proper. His language was (Ford's ed. No. 78, p. 521):

> "If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is a proper and a peculiar province of the courts. The Constitution is, in fact, and must be regarded by the judges, as the fundamental law. It, therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the constitution ought to be preferred to the statute; the intention of the people to the intention of their agents."

Notwithstanding this assurance, destined as it was to become an elemental feature of our constitutional jurisprudence,[1] it is well known that the consent of the people in the necessary number of States was secured only upon the pledge that amendments recognizing the reserved powers of the States and protecting the individual against the abuse of the powers granted to the national government would be forthwith submitted. *Barron* v. *The Mayor and City Council of Baltimore*, 7 Pet. 243, 250. In pursuance of this pledge, the first Congress (1 Stat. 97; Rev. Stat. p. 28, note) proposed the first ten articles of amendment to the Constitution, "in order," as recited in the preamble of the resolution, "to prevent misconstruction or abuse of its powers" and for the purpose of adding "declaratory and restrictive clauses." Of these restrictive clauses, the Fifth Article provides that "no person shall . . . be deprived of life, liberty or property, without due process of law," and the Tenth Article provides that "the powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people." These amendments are clearly to be regarded of equal force and validity with the provisions of the Constitution itself. As Mr. Justice Shiras, speaking for the court in the recent case of *Prout* v. *Starr*, 188 U.S. 537, 543, 544, said:

> "The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. . . .

[1] *Marbury* v. *Madison*, 1 Cranch, 137, 176–179; *McCulloch* v. *State of Maryland*, 4 Wheaton, 316, 421, 423; *Hepburn* v. *Griswold*, 8 Wall. 603, 614, 615; *Smyth* v. *Ames*, 169 U. S. 466, 527; *Matter of Application of Jacobs*, 98 N. Y. 98, 112.

> It is one of the important functions of this court to so interpret the various provisions and limitations contained in the organic law of the Union that each and all of them shall be respected and observed."

But whether the Fifth and Tenth Amendments constitute limitations upon the taxing power of Congress has never yet been expressly adjudged. The wise rule of our system of jurisprudence which confines adjudications by the courts to actual cases as they arise from time to time, has made the growth of American constitutional law extremely slow, and novel exercises of governmental power are constantly presented which require a renewed exposition of fundamental principles and a re-examination of the distribution of governmental powers contained in the Constitution.[1] For centuries, the principles of the common law have been growing by slow steps to maturity and symmetry, evolving rules of private justice as between man and man, and it is, therefore, hardly astonishing that the growth of constitutional jurisprudence also should be by slow and cautious steps in the application to individual cases of the eternal principles of public justice embodied in the Constitution which protect personal liberty and property against the abuse of the powers of government. Although the Constitution has been in operation for one hundred and fourteen years, this court has not yet adjudged whether there are any qualifications of the power of Congress to levy taxes other than the rules of apportionment and geographical uniformity, except in so far as the instrumentalities of the state governments are concerned.[2] Indeed, it was not until

[1] *Lelaup* v. *Port of Mobile*, 127 U. S. 640, 648.

[2] *The Collector* v. *Day*, 11 Wall. 113, 124; *United States* v. *Railroad Company*, 17 Wall. 322, 327; *Van Brocklin* v. *State of Tennessee*, 117

May, 1900, in the case of *Knowlton* v. *Moore*, 178 U. S. 41, 92, that the true meaning of the provision "uniform throughout the United States" was definitely settled to be geographical uniformity.[1] In the later case of *Wight* v. *Davidson*, 181 U. S. 371, 377, Mr. Justice Shiras stated in the opinion of the court, referring to a federal statute, that "the constitutional right against unjust taxation is given for the protection of private property," but did not discuss what provision of the Constitution secured that right.[2] And still later, in the case of *Patton* v. *Brady*, 184 U. S. 608, 622, we find Mr. Justice Brewer stating that the rule of geographical uniformity was the only limitation imposed upon Congress by the framers of the Constitution and the people who adopted it in respect of the power to lay excise taxes. Yet, it cannot be supposed that this language was intended to recognize the existence of an unrestrained taxing power, in view of the dissent of the learned Justice in *Knowlton* v. *Moore*, 178 U. S. 41, 110.

From the statement of facts, it appears that the inquiry in each of the cases at bar is confined to the validity of the act of Congress of May 9, 1902, in so far as it operates upon the internal commerce of the States of Illinois and Ohio. The oleomargarine in question was manufactured and sold in Illinois and Ohio by residents of those States and the transaction was confined to

---

U. S. 151, 178; *Mercantile Bank* v. *New York*, 121 U. S. 138, 162; *Income Tax Cases*, 157 U. S. 429, 584; *Plummer* v. *Coler*, 178 U. S. 115, 117; *Ambrosini* v. *United States*, 187 U. S. 1, 7; *Snyder* v. *Bettman*, 190 U. S. 249, 253.

[1] See, however, Mr. Justice Field's discussion of the provision in *Income Tax Cases*, 157 U. S. 429, at p. 592 *et seq.*

[2] See also *Parsons* v. *District of Columbia*, 170 U. S. 45, 51.

the internal commerce of each State. It is, of course, settled that Congress was not delegated any power whatever to regulate the internal commerce of the States, and that the regulation of such commerce was expressly reserved to the States by the Tenth Amendment. *Gibbons* v. *Ogden*, 9 Wheat. 1, 194, 203; *License Cases*, 5 How. 504, 574, 599; *Passenger Cases*, 7 How. 283, 400; *License Tax Cases*, 5 Wall. 462, 470–471; *United States* v. *Dewitt*, 9 Wall. 41, 44; *Trade-Mark Cases*, 100 U. S. 82, 96–97; *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 12, 13. That the police power never was surrendered by the States is also a proposition that need not be argued. It is "conceded in all the cases." *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 661; see also *In re Rahrer*, 140 U. S. 545, 554, 556; *Plumley* v. *Massachusetts*, 155 U. S. 461, 472; *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 11, 13; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 558. And the act now before the court, if grounded upon the attempt to regulate the manufacture of dairy products and oleomargarine and their sale in the internal commerce of the States, would be clearly beyond the powers of Congress and unconstitutional. *United States* v. *Dewitt*, 9 Wall. 41, 45; *United States* v. *Fox*, 94 U. S. 315, 320; *Trade-Mark Cases*, 100 U. S. 82, 96; *Covington, &c., Bridge Co.* v. *Kentucky*, 154 U. S. 204, 210; *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 12, 13; *United States* v. *Boyer*, 85 Fed. Rep. 424, 432.

The provisions of this act, so far as they affect the internal commerce of a State, can, therefore, only be sustained under the power of Congress to tax and to employ necessary and proper means for carrying that

power into execution. It follows that the exact question presented in the cases at bar is whether Congress may prohibit the internal manufactures of the States by means of a prohibitive tax.

The power of Congress to exclude any commodity from interstate commerce or to lay a prohibitive excise tax upon articles transported between States in order indirectly to accomplish that end, need not now be discussed. It will be time enough to consider the subject when a case actually involving that momentous question shall arise, for it would be difficult to suggest one of a graver character or the decision of which would be more far-reaching. Nevertheless, we may remark, in the language of Mr. Justice Harlan, delivering the opinion of the court in the recent *Lottery Case*, 188 U. S. at pp. 362–363:

> "The power of Congress to regulate commerce among the States, although plenary, cannot be deemed arbitrary, since it is subject to such limitations or restrictions as are prescribed by the Constitution. This power, therefore, may not be exercised so as to infringe rights secured or protected by that instrument. It would not be difficult to imagine legislation that would be justly liable to such an objection as that stated, and be hostile to the objects for the accomplishment of which Congress was invested with the general power to regulate commerce among the several States."

Nor, as to foreign commerce, is there any need to challenge or doubt the unlimited power of Congress to exclude or prohibit, and, as a means to that end, to lay prohibitive duties. Its authority to do so does not rest upon the taxing power, for even if the national government had no power to tax, its power

to regulate foreign commerce and international relations would be broad enough to support prohibitory duties on imports. No one has ever doubted that a governmental power to regulate international trade included the power to tax it as a means of regulation. The American colonies did not deny the authority of the British Parliament to tax them *as a regulation of commerce.* The War of the Revolution was precipitated because Parliament sought to use this power for another object, namely, the raising of revenue as such.[1]

It may, therefore, be conceded that Congress, under the plenary power to regulate our relations with foreign countries, can exclude commodities of any nature whatsoever, and levy prohibitive taxes or protective duties to accomplish that object. The power of Congress—the legislative power of a sovereign nation—to exclude foreign persons or commodities in its judgment and discretion need not be challenged in the slightest degree. But no one would seriously suggest that any class of American citizens could be excluded or deported under the same power which enables Congress to exclude or deport aliens. *United States* v. *Wong Kim Ark*, 169 U. S. 649, 653. When we say that Congress may exclude or deport foreigners or their products or publications from the United States, or pass a non-intercourse law, or place an embargo upon foreign ships or manufactures, we are but recognizing the ancient doctrine of international law that an alien and an alien's property come into the territory of a sovereign nation only by its sufferance, and may be

[1] *Gibbons* v. *Ogden*, 9 Wheat. 1, 199, 202.

excluded at its will.[1] And whether the exclusion be for the purpose of self-defense, or as an incident to the regulation of imports or commerce, or otherwise, the right to exclude or deport or prohibit is as much the sovereign's prerogative as the power to make treaties giving to foreigners the privilege of abiding or of bringing or selling their goods or publications within the sovereign's domain. That this attribute of sovereignty has been surrendered by and does not belong to the States cannot for a moment be doubted, for the States are expressly forbidden to enter into any form of treaty.[2]

In Cooley on Taxation, the distinguished author well says (at pp. 11, 12, 13):

> "In the laying of taxes, one purpose had in view may be to encourage one branch of industry or trade, though at the expense of others; as where a tax is laid upon certain fabrics received from abroad by the exchanges of commerce for the sake of encouraging the domestic producer of similar articles, on whose industry the tax operates as a bounty. Such a burden, however, may be so heavy that the market will not warrant its being paid, and in such case, instead of producing revenue, it merely precludes importation. But a law which, under the name of taxation, has for its purpose only to embarrass and, perhaps, to destroy a certain branch of commerce, if enacted by a State, would look to the general police power for its justification; and, if enacted by the general government, would seem more properly to derive its force from the authority conferred upon the government to regulate commerce,

[1] *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 659; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 707, 712; *United States* v. *Brigantine "William,"* 2 Hall's Am. Law Journal, 255; *Gibbons* v. *Ogden*, 9 Wheaton, 1, 191, 192.

[2] Section 10 of Article I of the Constitution of the United States.

and the intercourse with foreign countries, than to an authority conferred for revenue purposes, which such a law would not aim or tend to subserve. . . . As no one will pay the tax who does not expect to be reimbursed the expense from the profits of sales, it is obvious that the heavier the tax the fewer can afford to pay it, and it may be made so heavy that no one can afford to pay it, and then it becomes prohibitory. A tax laid for the double purpose of regulation and revenue must be grounded in both the police and the taxing power; *but the grant of a power to tax would not authorize the imposition of a burden in its nature and purpose prohibitory.*"

II.

THE INTERNAL COMMERCE OF THE STATES AND THE EXERCISE OF THE TAXING POWER BY CONGRESS.

In the cases at bar, the court is called upon to consider what purports on its face to be a tax law, but which, it is contended, constitutes the imposition of a burden in its nature and purpose prohibitory of the internal commerce of the States in a recognized article of commerce.[1]

There can be no reasonable doubt that any statute of Congress which purported on its face to prohibit internal commerce in oleomargarine would be declared by this court to be unconstitutional and void on the ground that it sought to accomplish an object not entrusted to Congress and invaded the powers reserved to the States.[2] It is now to be determined whether Congress may nevertheless accomplish this forbidden object and thereby under the form of a tax law, do indirectly what it could not do directly.

[1] *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 8.
[2] *United States* v. *Dewitt*, 9 Wall. 41, 43-45; *Trade-Mark Cases*, 100 U. S. 82, 96; *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 11-13.

If the object of the act be legitimate taxation, the excise in question is concededly within the constitutional powers of Congress; but if, under the pretext of laying an excise on manufactures, the object sought to be accomplished is to prohibit or destroy the manufactures and internal commerce of the States, then it is submitted that the legislation is not legitimate taxation at all and is beyond the authority delegated to Congress and conflicts with the powers expressly reserved to the States.

Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 421, 423, among other things said:

> "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, and which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional. . . . Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."

The settled doctrine of this court is that whatever may be the motive or pretext or guise of a statute, or in whatever language it may have been framed, its purpose and its validity must be determined by its natural and reasonable effect to be ascertained from the practical operation of its provisions.

Thus, in *Henderson* v. *Mayor of New York*, 92 U. S. 259, 268, Mr. Justice Miller, delivering the unanimous opinion of the court, among other things, said:

> "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and if it is apparent that the object of this statute, as judged by that criterion, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign shore, and landed at the port of New York, it is as much a tax on passengers if collected from them, or a tax on the vessel or owners for the exercise of the right of landing their passengers in that city, as was the statute held void in the *Passenger cases*. To require a heavy and almost impossible condition to the exercise of this right, with the alternative of payment of a small sum of money, is, in effect, to demand payment of that sum."

Mr. Justice Miller in *Morgan* v. *Louisiana*, 118 U. S. 455, 462, again referred to this point in the following language:

> "In all cases of this kind it has been repeatedly held that, when the question is raised whether the State statute is a just exercise of State power or is intended by roundabout means to invade the domain of Federal authority, this court will look into the operation and effect of the statute to discern its purpose. See *Henderson* v. *Mayor of New York*, 92 U. S. 259; *Chy Lung* v. *Freeman*, 92 U. S. 275; *Cannon* v. *New Orleans*, 20 Wall. 577."

In construing a state statute applicable to oleomargarine, Mr. Justice Peckham in *Collins* v. *New Hampshire*, 171 U. S. 30, 33, 34, speaking for the court, said:

> "The direct and necessary result of a statute must be taken into consideration when deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect. *Henderson* v. *Mayor of New York*, 92 U. S. 259; *Morgan's Steamship Co.* v.

Louisiana, 118 U. S. 455, at 462. Although under the wording of this statute the importer is permitted to sell oleomargarine freely and to any extent, provided he colors it pink, yet the permission to sell, when accompanied by the imposition of a condition which, if complied with, will effectually prevent any sale, amounts in law to a prohibition."

Indeed, as Mr. Justice Harlan said, in *Mugler* v. *Kansas*, 123 U. S. 623, 661:

> "The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority."

And Mr. Justice Brewer in *Fairbank* v. *United States*, 181 U. S. 283, 294, 295, 300, speaking of the decision in *Woodruff* v. *Parham*, 8 Wall. 123, used the following language:

> "In other words, that decision affirms the great principle that what cannot be done directly because of constitutional restrictions cannot be accomplished indirectly by legislation which accomplishes the same result. . . . The form in which the burden is imposed cannot vary the substance. . . . Constitutional provisions, whether operating by way of grant or limitation, are to be enforced according to their letter and spirit, and cannot be evaded by any legislation which, though not in terms trespassing on the letter, yet in substance and effect destroy the grant or limitation."

In *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 698, Mr. Chief Justice Fuller said, speaking of taxation:

> "The substance and not the shadow determines the validity of the exercise of the power."

And again in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 581:

> "If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution. . . . But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this court."

In *Thomas* v. *Gay*, 169 U. S. 264, 283, Mr. Justice Shiras, speaking of the acts of a territorial legislature under authority of Congress, said:

> "When, as may sometimes happen, the legislature transcends its functions and enacts, in the guise of a tax law, a law whereby the property of the citizen is confiscated, or taken for private purposes, the judiciary has the right and duty to interpose."

Mr. Justice McKenna, in *Smith* v. *St. Louis and Southwestern Ry. Co.*, 181 U. S. 248, 257, said:

> "Any pretense or masquerade will be disregarded, and the true purpose of a statute ascertained."

It must, therefore, be presumed that the purpose which Congress had in view in the statute of 1902 was to accomplish that which follows as the natural and reasonable effect of its enactment, and that if the tax now in question operates as a prohibition of the manufacture and sale of an article of commerce, the legislation is an invasion of the powers reserved to the States, and seeks to accomplish an object beyond the powers granted to Congress.

It is not, of course, disputed that Congress for national purposes may tax the manufactures of a State whether constituting internal or interstate

commerce, and that both the national and state governments can lay excise taxes upon the same articles. Conflict may thus arise; and as commodities can only bear a certain amount of taxation, varying according to the nature of the article, the exercise of the taxing power by one government may indirectly affect the collection of taxes by the other. The mere fact that Congress taxed a given article, *e. g.*, liquors, would not, of course, limit or affect the power of the States either to tax or to prohibit its manufacture so far as concerned internal commerce; [1] and conversely the fact that a State taxed its manufactures would not limit or affect the power of Congress to tax the same commodities. In the case at bar, there is, however, no conflict of taxing powers, for neither the State of Illinois nor the State of Ohio taxes the manufacture of oleomargarine other than indirectly by means of general property taxes.

In its final analysis, then, the court is asked to determine the validity of the present law according to its natural and reasonable effect which "amounts in law to a prohibition"; in other words, to determine by its practical operation whether it is a tax law at all, or merely an attempt to prohibit internal commerce under the guise or pretext of a tax law. There is no rule of constitutional law and no consideration of public policy which will prevent this court from deciding according to substance and not to form, simply because a given enactment purports to be an exercise of the taxing power. The indisputable law of the Constitution is

[1] *License Tax Cases*, 5 Wall. 462, 470; *Pervear* v. *The Commonwealth*, 5 Wall. 475, 479.

that Congress may not interfere with or regulate the internal commerce or affairs of a State, and the court will enforce that rule according to its letter and its spirit. The Tenth Amendment imperatively forbids any such interfering regulation as much as if the Constitution declared in so many words that Congress should not interfere with internal commerce. It surely cannot be maintained as a rule of our constitutional law that what Congress may not do directly it may nevertheless do indirectly under the pretext of an exercise of the taxing power. As Mr. Chief Justice Fuller said in the *Income Tax cases, supra* (157 U. S. 429, 581):

> "It is the substance and not the form which controls, as has indeed been established by repeated decisions of this court."

But, it will be said, the concession of the power to tax brings the case within the rule that the extent of the exercise of the taxing power cannot be controlled by the courts. This argument, however, begs the whole question. The point to be decided is whether or not this is a tax law or a regulation of the internal commerce of the States. If it be a legitimate tax law, it is constitutional. If the nominal exercise of the taxing power be a mere pretext "for the accomplishment of objects not entrusted to the government," then it is not constitutional, and it is the province of this court to so declare. It may be often difficult to draw a line between a tax law and an attempt to regulate or prohibit under the guise or pretext of a tax; but yet it is not always impracticable, for the validity of many enactments, state and national, may depend upon degree. The amount of a tax or license fee or regulation of rates

frequently forms the basis of judicial action and determines the validity of legislation. The court has found no insuperable difficulty in determining the difference between a tax and a reasonable fee covering expenses to protect the government against fraud,[1] between a tax on exports and a mere stamp duty on a document,[2] between a tax and a penalty,[3] between a tax and a covert regulation of interstate commerce,[4] between a legitimate regulation of rates and a regulation which is confiscatory.[5] The amount of the tax imposed in a given case has often been considered by this court in determining whether a particular statute was valid as a means to accomplish a constitutional object, or invalid as a pretext to accomplish an object forbidden by the Constitution. The instance of a license tax upon persons or corporations engaged in foreign or interstate commerce is a common one. In such a case, the only object which may constitutionally be accomplished by a State is compensation for reasonable governmental inspection or supervision. If the amount of the tax be materially in excess of what is necessary for that object, there is an indication of a purpose to regulate foreign or interstate commerce; and it is therefore necessary for the court to draw the line in each case according to the amount and adjudge what amount will constitute taxation for a proper purpose and what amount will constitute a regulation of commerce. *Atlantic, etc., Tel. Co.* v. *Philadelphia*,

---

[1] *Pace* v. *Burgess, Collector*, 92 U. S. 372, 374, 375.
[2] *Fairbank* v. *United States*, 181 U. S. 283, 290.
[3] *Helwig* v. *United States*, 188 U. S. 605, 611.
[4] *Atlantic, etc., Tel. Co.* v. *Philadelphia*, 190 U. S. 160, 162.
[5] *Smyth* v. *Ames*, 169 U. S. 466, 527.

190 U. S. 160, 164. While a State may impose a license fee upon foreign corporations engaged in interstate commerce and indirectly tax their franchises,[1] it cannot for a moment be doubted that, if the State should impose a prohibitory tax, it would be unconstitutional and that the question of constitutionality in such a case would depend entirely upon degree. If, for example, a State should impose a property tax upon an express company,[2] the effect of which was practical prohibition, no doubt the court would hold that it was not a legitimate tax at all, but a roundabout way of prohibiting indirectly what the State could not prohibit directly, namely, interstate commerce. So, whenever it is claimed that the amount of a state inspection charge upon articles of foreign or interstate commerce is so much in excess of what is reasonably necessary to accomplish that object as to evince a purpose to interfere by taxation with foreign or interstate commerce, the court must decide when the amount in the particular case becomes unconstitutional. *Patapsco Guano Co.* v. *North Carolina*, 171 U. S. 345, 351 *et seq.*, citing cases. The same principle applies in those cases where the amount of compensation for the use of property affected by a public interest is drawn in question as being confiscation in the guise of police regulation. *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S.

[1] *Maine* v. *Grand Trunk Ry Co.*, 142 U. S. 217, 228; *Ficklen* v. *Shelby County*, 145 U. S. 1, 23; *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 697; *Atlantic, etc., Tel. Co.* v. *Philadelphia*, 190 U. S. 160, 163, citing cases.

[2] *Adams Express Company* v. *Ohio*, 165 U. S. 194, 220; *Adams Express Company* v. *Kentucky*, 166 U. S. 171, 180; *Adams Express Company* v. *Ohio*, 166 U. S. 185, 221.

238, 250, and *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, 85, citing cases.

At the last term, in *Helwig* v. *United States*, 188 U. S. 605, 611, Mr. Justice Peckham said:

> "Whether called a 'further sum' or an 'additional duty,' or by some other name, the amount imposed was so large in proportion to the value of the merchandise imported as to show beyond doubt that it was a sum imposed not in fact, as a duty upon an imported article, but as a penalty and nothing else."

So, with regard to the tax in question, the amount of the tax is so large in proportion to the value of the merchandise as to show beyond doubt that it was a sum imposed, not in fact as an excise for revenue, but as a prohibition, and nothing else.

Let us take, for the purpose of concrete illustration, the case of oleomargarine. It has been held that a State, under the power to regulate its internal commerce, could prohibit the manufacture and sale of oleomargarine (*Powell* v. *Pennsylvania*, 127 U. S. 678, 686; *Plumley* v. *Massachusetts*, 155 U. S. 461, 467, and *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 246), but that it could not prohibit the sale of oleomargarine manufactured in other States and offered for sale in the course of interstate commerce. *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 21, 25. Is it conceivable that nevertheless, a State, could indirectly do what this court has said it could not directly do, that is, practically prohibit interstate commerce in oleomargarine by taxing it to death? Surely this court would not entertain an argument attempting to uphold such legislation upon the ground that on

its face it was impartial and applied alike to internal and interstate commerce and that the power to tax involved the power to destroy.[1]

If a State should impose a tax upon a commercial commodity as *property*[2] and the effect of such a tax, as to articles brought from other States, was to destroy all opportunity to sell the commodity, it cannot be doubted that the law would be declared unconstitutional as interfering with interstate commerce even though the same amount of tax should be laid on domestic manufactures as property, and even though such a tax would only apply after the 'original package' of importation had been broken and the contents exposed for sale.[3] There would be *prima facie* no discrimination in the law; on its face it would apply impartially to home and foreign manufactures alike. Nevertheless, such a tax law would be held unconstitutional; for, if allowed to operate, it could as effectually bar the products and manufactures of other States as if the law directly enacted that such articles should not be sold.[4] The products of one or more States could thus, by taxation, be excluded from any State. Fortunately, "such efforts have been heretofore rendered fruitless by the supervis-

[1] *Woodruff* v. *Parham*, 8 Wall. 123, 131, 140; *Brown* v. *Houston*, 114 U. S. 622, 634. Of course, where the State may prohibit as a police regulation, different considerations are presented, as discussed by Judge Cooley in the quotation from his work on Taxation, *supra*, pp. 27, 28.

[2] *Woodruff* v. *Parham*, 8 Wall. 123, 131, 140; *Hinson* v. *Lott*, 8 Wall. 148, 152; *Brown* v. *Houston*, 114 U. S. 622, 632, 634; *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 697; *American Refrigerator Transit Co.* v. *Hall*, 174 U. S. 70, 74; *Reymann Brewing Co.* v. *Brister*, 179 U. S. 445, 453.

[3] *May* v. *New Orleans*, 178 U. S. 496, 508.

[4] *Leloup* v. *Port of Mobile*, 127 U. S. 640, 647; *Brennan* v. *Titusville*, 153 U. S. 289, 303.

ing action of this court."[1] In the supposed case, it would undoubtedly be held that, in whatever language the statute was framed, its purpose must be determined by its natural and reasonable effect. The court would brush aside the form and the pretext, and hold that the tax in its practical effect was prohibitory, that the purpose of the legislation was legally to be determined by such prohibitory effect, and that prohibition was beyond the constitutional power of a State.[2]

In the case of such a property tax levied by a State, would it not be relevant to show that the amount of the tax was such as to prevent sales, and that consequently it was not strictly a tax law at all but a regulation of interstate commerce? It would undoubtedly be held that in whatever language the statute was framed, its purpose must be determined by its natural and reasonable effect.

On the other hand, if the tax was not prohibitive but a proportional and reasonable charge for the maintenance of the state government, levied upon all similar *property*, entirely different considerations would be presented, and it would then be for the courts to determine whether such a law was in its purpose, operation or effect a proper and reasonable tax law which did not unduly interfere with the power of Congress to regulate interstate commerce.[3] In such a case, too, would it not be relevant to show that the amount of the tax was such as not to operate as a practical prohibition of

[1] *Caldwell* v. *North Carolina*, 187 U. S. 622, 633.

[2] *American Fert. Co.* v. *Board of Agriculture, No. Car.*, 43 Fed. Rep. 609, 613, cited in *Pataps:co Guano Co.* v. *North Carolina*, 171 U. S. 345, 347.

[3] *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 697.

sales in competition with the products of the taxing State? Or, if it were in the guise of an inspection or license fee, would it not be relevant to show that it was not large enough to operate as a prohibition or penalty?[1]

Are not these all cases of degree and does not the extent and effect of the tax determine its constitutionality?

Nor does the fact that the act of Congress applies also to interstate commerce affect the question, for it is the settled law of this court that the power of Congress to regulate interstate commerce does not uphold any act which operates directly upon internal commerce and invades the domain of the States. The very point was involved in the *Trade-Mark Cases*, 100 U. S. 82, 95, 96, where, delivering the unanimous opinion of the court, Mr. Justice Miller said:

> "When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several States, or with the Indian tribes. If not so limited, it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trade, to commerce at all points, especially if it be apparent that it is designed to govern the commerce wholly between citizens of the same State, it is obviously the exercise of a power not confided to Congress."

The principal argument in support of the law has heretofore been based upon the famous phrase "that the power to tax involves the power to destroy," in

[1] *Ward* v. *Maryland*, 12 Wall. 418, 425, 429; *Welton* v. *State of Missouri*, 91 U. S. 275, 278; *People* v. *Compagnie Gen. Transatlantique*, 107 U. S. 59, 60; *Moran* v. *New Orleans*, 112 U. S. 69, 73; *Walling* v. *Michigan*, 116 U. S. 446, 461; *Emert* v. *Missouri*, 156 U. S. 296, 311.

support of which is cited the decision of this court in *Veazie Bank* v. *Fenno*, 8 Wall. 533.

We know of no dictum in any decision that has been more misconstrued than the statement of Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 431, that "the power to tax involves the power to destroy," nor of one whose misapplication is more illustrative of the dangers which lurk in a brilliant epigram. Since that decision, there has been no arbitrary or unjust exaction under the guise or pretext of taxation but that it is said to be sanctioned by this dictum. It has done immeasurable harm, for it has been held up before legislatures as placing in their hands unrestrained power to exercise tyranny in the form of law. "How oft the sight of means to do ill deeds makes ill deeds done."[1] The great Chief Justice never meant to say that the taxing power could be arbitrarily exercised to the extent to which his language has been perverted, or that it could be used as a pretext to accomplish a forbidden object. He would have repudiated such a proposition as monstrous and against all justice and reason. Far from meaning to say that the power of taxation could be used as a mere pretext for accomplishing objects not entrusted to the government, at page 423 of the same opinion, he distinctly pointed out that Congress could not do so. He never meant that under the power of taxation, either of the federal or the state governments, any class of persons or business could properly be selected for destruction. He was speaking of a discriminating state

[1] King John, IV, 2. See "The Oleomargarine Bill" (Gov. Print, 1901), p. 857.

tax imposed upon an instrumentality of the national government. He did not mean that, under the pretense of taxation, Congress could invade any State and destroy one of its industries solely for the purpose of benefitting another competing industry. He was speaking of a legitimate tax law. Had the occasion arisen in his time, who can doubt that he would have limited this now famous dictum to the facts of that case? *Cohens* v. *Virginia*, 6 Wheat. 264, 399. Doubtless he would have held that the Constitution will not admit of the exertion of any power of government, be it the taxing power or any other, which, in its last analysis, is appropriate and calculated only to interfere with the internal concerns of the States and to accomplish the destruction of private property and the deprivation of the right to pursue a useful calling without due process of law.

Even though it be true, in a proper sense, that the power to tax involves the power to destroy, it is no less true, by the reasoning of the opinion in *McCulloch* v. *Maryland* (at p. 423), that this power to destroy, in the hands of Congress, must not be exerted to accomplish objects not assigned to it by the Constitution. It must operate in harmony with the constitutional scheme. On the other hand, this same power to destroy in the hands of a State (which is the sense in which it was discussed by Marshall) is justifiable by the inherent power of government originally and always residing in the States, provided only it be not forbidden by the Constitution. In short, though the destruction of the oleomargarine industry by a repressive state tax might be supported under the police power by all those

familiar arguments which have been advanced in this court during the past sixteen years,[1] a similar repressive tax by Congress must be supported, if at all, on other grounds. Cooley on Taxation, p. 12, 13.

The suggestion in *McCulloch* v. *Maryland*, 4 Wheat. 316, 435, that Congress might tax a state instrumentality with more reason than a State could tax an instrumentality of the Nation, cannot be cited as sustaining an unlimited taxing power in Congress, inasmuch as it has long since been established that Congress has no power to tax the instrumentalities of a State (*Snyder* v. *Bettman*, 190 U. S. 249, 253), unless it be necessary and proper to carry into execution some power given to Congress other than the power of taxation.

In *Berney* v. *Tax Collector*, 2 Bailey (S. C.) 654, 674, Harper, J., said, in speaking of a state tax upon stock of the United States Bank, and after discussing Marshall's dictum that the power to tax involves the power to destroy:

> "It will be perceived, that in my opinion the question is, whether the imposition in question is, *in good faith*, *a tax*, or whether, under the guise of a tax, a *penalty* was intended to be inflicted, with a view to the suppression of the bank. Such a distinction was made in the case of *The State* v. *Allen*, 2 M'C. 55, where a tax, as it was called, of $10,000, was imposed on the act of selling lottery tickets. And this court held, that, although called a tax, it was in fact a penalty, having no reference to property; and that it violated the provision of our constitution, that 'no freeman of this State shall be taken, or imprisoned, or disseized of his

[1] *Powell* v. *Pennsylvania*, 127 U. S. 678; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238.

freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or the law of the land.'

I am aware, that it has been objected to this method of construction, that it is liable to too great uncertainty, and gives to the courts a dangerous latitude of construction, in determining on the *intention* of the legislature. When will you say that the law becomes unconstitutional? When the tax is raised to five, or ten, or fifty per cent.? By what rule shall government be conducted? Or when can the legislature be assured that its laws will have effect? In general, perhaps, it is desirable, that rules of law should be technical and artificial; being thus susceptible of greater precision: but this is not always practicable, and I fear that we may sometimes run into the most dangerous errors, in searching after this precise, technical, artificial rule. In such a case as this, it is not possible to have one, unless, by adopting such artificial reasoning as I have referred to in the beginning, we pervert the constitution to purposes, for which it, most notoriously, was never intended, and change the whole character of our institutions."

The *Veazie Bank* case is not authority for an unlimited and arbitrary power to tax. On the contrary Chief Justice Chase said (p. 541) that—

> "There are, indeed, certain virtual limitations, arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the power if so exercised as to impair the separate existence and independent self-government of the States, *or if exercised for ends inconsistent with the limited grants of power in the Constitution.*"

The tax in that case was sustained upon the ground that Congress, in the exercise of undisputed authority to regulate the currency, could adopt any means suitable for that purpose, and that a prohibitive tax con-

stituted an appropriate means.[1] If the statute had declared on its face that it was intended to prohibit issues of currency by state banks, the act would have been constitutional. The *end* was legitimate and prohibitory *means* were appropriate. If there had been no power in Congress to regulate the currency, it cannot be doubted that the tax then imposed would have been regarded as seeking to accomplish an object not entrusted to Congress and "exercised for ends inconsistent with the limited grants of power" to the federal government and the powers expressly reserved to the States.

That the *Veazie Bank* decision does not rest upon the proposition that the power to tax involves the power to destroy the currency of state banks has been repeatedly recognized by this court.

Thus, at the same term, Mr. Justice Miller, who concurred in the opinion of the court in the *Veazie Bank* case, said in his dissenting opinion in *Hepburn* v. *Griswold*, 8 Wall. 603, 636:

> "In the *Veazie Bank* v. *Fenno*, decided at the present term, this court held, after full consideration, that it was the privilege of Congress to furnish to the country the currency to be used by it in the transaction of business, whether this was done by means of coin, of the notes of the United States, or of banks created by Congress. And that as a means of making this power of Congress efficient, that body could make this currency exclusive by taxing out of existence any currency authorized by the States."

The precise question decided in the *Veazie Bank* case arose again ten years later in *National Bank* v. *United*

[1] See, however, the language used at p. 548.

States, 101 U. S. 1, and the language employed in deciding it shows clearly the scope of the principle involved. Chief Justice Waite, delivering the opinion of the court, said (pp. 5, 6):

> "We think this case comes directly within the principles settled in *Veazie Bank* v. *Fenno*, (8 Wall. 533), where it was distinctly held that the tax imposed by that section on national and State banks for paying out the notes of individuals or State banks used for circulation was not unconstitutional. The reason is thus stated by Mr. Chief Justice Chase: 'Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may constitutionally secure the benefit of it to the people by appropriate legislation. To this end Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile.' . . . The tax thus laid is not on the obligation, but on its use in a particular way. As against the United States, a State municipality has no right to put its notes in circulation as money. It may execute its obligations, but cannot, against the will of Congress, make them money. The tax is on the notes paid out, that is, made use of as a circulating medium. Such a use is against the policy of the United States. Therefore the banker who helps to keep up the use by paying them out, that is, employing them as the equivalent of money in discharging his obligations, is taxed for what he does. *The taxation was no doubt intended to destroy the use; but that, as has just been seen, Congress had the power to do.*"

The true scope of the principle of the *Veazie Bank* case is perhaps most clearly apparent from its application in the *Head Money Cases*, 112 U. S. 580, 596, decided in 1884. It is there held that an otherwise unconstitutional exercise of the taxing power may be upheld where the object accomplished is one committed to Congress by the Constitution; and the *Veazie Bank* case is relied on as the leading authority. Mr. Justice Miller, who delivered the opinion of the court, said:

> "If this is an expedient regulation of commerce by Congress, and the end to be attained is one falling within that power, the act is not void, because, within a loose and more extended sense than was used in the Constitution, it is called a tax. In the case of *Veazie Bank* v. *Fenno*, 8 Wall. 533, 549, the enormous tax of eight [ten] per cent. per annum on the circulation of State banks, which was designed, and did have the effect, to drive all such circulation out of existence, was upheld because it was a means properly adopted by Congress to protect the currency which it had created, namely, the legal-tender notes and the notes of the national banks. *It was not subject, therefore, to the rules which would invalidate an ordinary tax pure and simple.* . . . We are clearly of opinion that, in the exercise of its power to regulate immigration, and in the very act of exercising that power, it was competent for Congress to impose this contribution on the ship owner engaged in that business."

The *ratio decidendi* of the cases upon this point is summed up by Mr. Justice Miller in *Loan Association* v. *Topeka*, 20 Wall. 655, 663, namely,—

> "Given a purpose or object for which taxation may be lawfully used, and the extent of its exercise is in its very nature unlimited."

And the tax involved in that case was condemned because the object of the statute was found to be the

encouragement and benefit of certain private industries. To the same effect, see *Parkersburg* v. *Brown*, 106 U. S. 487, 500; *Cole* v. *LaGrange*, 113 U. S. 1, 6; *The State ex rel.* v. *Osawkee Township*, 14 Kan. 418, 427; *Lowell* v. *Boston*, 111 Mass. 454, 461; *Mead* v. *Acton*, 139 Mass. 341, 344; *Allen* v. *Inhabitants of Jay*, 60 Me. 124, 128, 138; *Sugar Co.* v. *Auditor General*, 124 Mich. 674, 678; *State* v. *Foley*, 30 Minn. 350, 357; *Weismer* v. *Village of Douglas*, 64 N. Y. 91, 100; *Bertholf* v. *O'Reilly*, 74 N. Y. 509, 515; *Sharpless* v. *Mayor of Philadelphia*, 21 Pa. St. 147, 168; Burroughs on Taxation, pp. 6, 506.

Answering the argument that the power to tax involves the power to destroy, Mr. Justice Harlan, delivering the dissenting opinion in *Fairbank* v. *United States*, 181 U. S. 283, 318, used the following language:

> "It is said that the power to tax is the power to destroy, and that if Congress can impose a stamp tax of ten cents upon the vellum, parchment or paper on which is written a bill of lading for articles to be exported from a state, it could as well impose a duty of five thousand dollars and thereby indirectly tax the articles intended for export. That conclusion would by no means follow. A *stamp* duty has now, and has had for centuries, a well defined meaning. It has always been distinguished from an ordinary tax measured by the value or kind of property taxed. If Congress, in respect of a bill of lading for articles to be exported, had imposed a tax of five thousand dollars for and in respect of the vellum, parchment or paper upon which such bill was written, the courts, looking beyond form and considering substance, might well have held that such an act was contrary to the settled theory of stamp tax laws, and that the purpose and necessary operation of such legislation was, in

violation of the Constitution, to tax the articles specified in such bill and not to impose simply a stamp duty. Here, the small duty imposed, without reference to the kind, quantity or value of the articles exported, renders it certain that when Congress imposed such duty specifically on the vellum, parchment or paper upon which the bill of lading was written or printed, it meant what it so plainly said; and no ground exists to impute a purpose by indirection to tax the articles exported."

If, therefore, "the courts, looking beyond form and considering substance" in the cases at bar, shall be persuaded that the purpose and necessary operation of this legislation be to accomplish an end or object not entrusted to this government, the legislation may and should be declared unconstitutional. *McCulloch* v. *Maryland*, 4 Wheat. 316, 423. In other words, given a case in which Congress has authority to prohibit, as in the case of foreign commerce or the currency, and it may accomplish that object by prohibitory taxation. If, however, Congress has not the power to prohibit as a legitimate end or object, it may not do so indirectly under the pretext of exercising the taxing power.

It may be argued that the prohibition of yellow oleomargarine is necessary and proper to facilitate the collection of the tax on other oleomargarine, and to prevent fraud in sales of articles taxed by the government; but the argument that the prohibitive tax of ten cents per pound was laid to facilitate the collection of the tax of one-quarter of one cent on other colors of oleomargarine cannot uphold the law. Such a purpose is too remote and uncertain. In *United States* v. *Dewitt*, 9 Wall. 41, 44, the question was as to the validity of section 29 of the Internal Revenue Act of

March 2, 1867 (14 Stat. 484), which made it a misdemeanor to mix for sale or to sell or offer for sale naphtha and illuminating oils, inflammable at less than a designated temperature. It was held that the act could have no constitutional operation within state limits because it was a mere police regulation relating exclusively to internal trade of the States. Chief Justice Chase, delivering the opinion of the court and referring to the want of jurisdiction in Congress to interfere with the internal commerce of the States, said (p. 45):

> "This has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion."

It was, however, urged in that case on behalf of the government that the prohibition of the sale of illuminating oil, inflammable at less than a certain temperature, was in aid and support of the internal revenue tax imposed on other illuminating oils. In answer to this suggestion, Chief Justice Chase, among other things, said (p. 44):

> "If the prohibition, therefore, has any relation to taxation at all, it is merely that of increasing the production and sale of other oils, and, consequently, the revenue derived from them, by excluding from the market the particular kind described. This consequence is too remote and too uncertain to warrant us in saying that the prohibition is an appropriate and plainly adapted means for carrying into execution the power of laying and collecting taxes."

A further conclusive answer to this contention is that there is no demand for uncolored oleomargarine, except as a substitute for lard, and as such, a true construction

of the act does not permit any tax to be laid upon it. The act taxes oleomargarine under one of two express conditions and not otherwise, that is when "made in imitation or semblance of butter," or, "when so made, calculated or intended to be sold as butter or for butter" (Section 2). It is plain that oleomargarine manufactured in the usual way is not in imitation or semblance of butter, unless it is colored yellow, because it is pure white, or almost pure white, in appearance, whilst practically all butter which goes on the market is uniformly colored a high shade of yellow throughout the year. It is no less plain that oleomargarine so made is not calculated or intended to be sold as or for butter, and not even as a substitute for butter, because it can be sold only as a substitute for lard. A product which does not look like butter, and which can be sold only as a substitute for lard, is not oleomargarine within the definition of the act for the purpose of taxation. This is the construction placed on the act by Attorney-General Garland in his letter of October 18, 1886, to the Secretary of the Treasury (18 Op. Atty.-Gen. 489). This opinion was accepted as final and has ever since been acted on by the Treasury Department (Oleomargarine regulations, June, 1902, p. 12); and the Commissioner of Internal Revenue has specifically decided, under the authority vested in him by section 14 of the act, that oleomargarine designed only as a substitute for lard is not subject to any tax, although it has a shade of yellow color (Treasury Decisions, Vol. 6, No. 3, p. 36).

III.

THE RESTRICTIONS UPON THE TAXING POWER CONTAINED IN THE FIFTH AMENDMENT.

As we have already seen, the first ten amendments to the Constitution of the United States were adopted as limitations upon the powers delegated to Congress "in order to prevent misconstruction or abuse of its powers" by means of "declaratory and restrictive clauses." It has never been determined whether the provisions of the Fifth Amendment prevent the abuse of the taxing power by means of arbitrary and discriminating taxes, the effect of which would be to deprive an individual or a selected class of liberty and property without due process of law.

So far as is disclosed by a careful perusal of the debates in the constitutional conventions at the time the Constitution was ratified, as well as of the debates in Congress when the first ten amendments were proposed, it does not appear that the provision requiring 'due process of law' contained in the Fifth Amendment was mentioned as protecting the individual against arbitrary or discriminating taxation. The import of the words may or may not have been assumed to apply to taxation as well as to all other powers in the exercise or abuse of which the rights of the individual might come in conflict with the powers of government. The same thing may also be said of the circumstances surrounding the adoption of the Fourteenth Amendment shortly after the close of the Civil War, and yet it is established beyond question that the requirement of 'due process of law' in the

later amendment clearly applies to the taxing power of the States.

There is, however, no principle of constitutional construction which would permit the court to say that because the question of arbitrary or discriminating taxes was not in the minds of those who framed and adopted these amendments, "in order to prevent misconstruction or abuse of its powers" by the national government, the Fifth Amendment should not be applied to an abuse of the taxing power as well as of any other power. The taxing power was the most important and far-reaching of the powers conferred; it was the one the absence of which above all others had rendered the government under the Articles of Confederation impotent and imbecil; it was the one most liable to abuse; it was the one around and about which waged the contest for ratification of the Constitution, and it was the one which of all powers could obviously "as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised."[1]

But even if it could be shown that the abuse of the taxing power was not in the minds of the people at the time these amendments were adopted and that the framers perceived and apprehended no danger from the abuse of that power, this fact would not tend to limit the scope of the amendments if the case now presented be fairly within their spirit and letter. As was said by Chief Justice Marshall in the famous

[1] *Loan Association* v. *Topeka*, 20 Wall. 655, 664.

case of *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 644:

"It is more than possible that the preservation of rights of this description was not particularly in the view of the framers of the constitution, when the clause under consideration was introduced into that instrument. It is probable that interferences of more frequent recurrence, to which the temptation was stronger, and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the state legislatures. But although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule, when established, unless some plain and strong reason for excluding it can be given. It is not enough to say that this particular case was not in the mind of the Convention, when the article was framed, nor of the American people when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception. The case being within the words of the rule must be within its operation likewise, unless there be something in the literal construction so obviously absurd or mischievous, or repugnant to the general spirit of the instrument as to justify those who expound the constitution in making it an exception.

On what safe and intelligible ground can this exception stand? There is no expression in the constitution, no sentiment delivered by its contemporaneous expounders, which would justify us in making it. In the absence of all authority of this kind, is there in the nature and reason of the case itself, that which would sustain a construction of the constitution not warranted by its words? Are contracts of this description of a character to excite so little interest, that we must exclude them from the provisions of the constitution, as being unworthy of the attention of those who framed the instrument? Or does public policy so imperiously

26772

> demand their remaining exposed to legislative alteration, as to compel us, or rather permit us to say, that these words, which were introduced to give stability to contracts, and which in their plain import comprehend this contract, must yet be so construed, as to exclude it?"[1]

Applying to the federal taxing power the doctrine thus lucidly stated, we may say that there is no reasonable ground which would justify the conclusion that if the abuse of the taxing power, by means of arbitrary, unequal and discriminating tax laws, had been in the minds of the framers of the Fifth Amendment, they would have varied its language so as to make it broader and more comprehensive. No one will seriously advance the proposition that public policy or the safety or perpetuity of the national government demand that Congress should have the power to impose arbitrary or prohibitive taxes upon internal industries. It would be repugnant to the very theory upon which these 'restrictive clauses' were drafted, and in conflict with the purpose sought to be accomplished by them, to now hold that there is in them no efficacy to restrict the most important power granted to Congress by the Constitution, the one most liable to abuse, and the one which at all times would most reach and affect the individual.

Indeed, it may be respectfully submitted that if it be now held that the requirement of 'due process of law' in the Constitution of the United States imposes no prohibition or limitation upon the taxing power of Congress, then the result must be that this amendment, in-

[1] See also *Slaughter-House Cases*, 16 Wall. 36, 72; *Ex parte Virginia*, 100 U. S. 339, 347, 361; *Holden* v. *Hardy*, 169 U. S. 366, 382, 385; *United States* v. *Wong Kim Ark*, 169 U.S. 649, 676.

tended to constitute part of a bill of rights protecting the people in their individual liberties as against the majority wielding the power of government, must now be construed as if it read :

> "No person shall be . . . deprived of life, liberty or property, without due process of law, *except it be in the form of taxation;* nor shall private property be taken for public use, without just compensation, *except in cases of taxation.*"[1]

But, aside from these considerations, it is confidently submitted that had the first Congress deliberated at length upon the choice of a provision which would be most effective to prevent an abuse of the taxing power, it would have been difficult to select one more appropriate than that of 'due process of law,' or language which it was more natural for the descendants of Englishmen to have selected for that purpose. It embodied then, as now, one of those maxims of constitutional law "which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts bill of rights, the government of the commonwealth 'may be a government of laws and not of men.'"[2]

The phrase 'due process of law' or its equivalent 'the law of the land' antedated the establishment of our political institutions, and was endeared to our fathers by antiquity and tradition, as well as by the noblest historical associations. It represented the broadest and most far-reaching guaranty of personal

[1] *County of Santa Clara* v. *Southern Pac. R. Co.*, 18 Fed. Rep. 385, 399; affirmed 118 U. S. 394, 417, 422.

[2] *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370.

26773

and property rights. There are no words in our language which signify or mean more in respect of the rights and liberties of the individual than either of these phrases. It is not deemed necessary, however interesting it would be, to trace the historical origin of the term 'due process of law' and the development of its meaning and scope, except to say that its first appearance in any of the great constitutional documents was probably in the Petition of Right in the third year of the reign of Charles I, and that it has ever since been regarded as having and importing exactly the same meaning as the words 'the law of the land' in Magna Charta.[1]

No statement of the general meaning of these equivalent phrases is more often quoted than that from Mr. Webster's argument in the famous *Dartmouth College case* (4 Wheat. at p. 581), viz.:

> "The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land."

The statement of Mr. Justice Story, in his work on the Constitution (5th edition, section 1945), is perhaps the most accurate, viz.:

> "Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one being dealt with belongs."

---

[1] *Hurtado v. California*, 110 U. S. 516, 521, 527, 543.

Judge Cooley, in his Constitutional Limitations, in speaking of this phrase, uses the following language (Sixth ed., p. 433):

> "While every man has a right to require that his own controversies shall be judged by the same rules which are applied in the controversies of his neighbors, the whole community is also entitled, at all times, to demand the protection of the ancient principles which shield private rights against arbitrary interference, even though such interference may be under a rule impartial in its operation. It is not the partial nature of the rule, so much as its arbitrary and unusual character, that condemns it as unknown to the law of the land."

The first exposition of these phrases by this court will be found in the case of *Bank of Columbia* v. *Okely*, 4 Wheat. 235, 244, where Mr. Justice Johnson, among other things, said:

> "As to the words from Magna Charta, incorporated into the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that *they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.*"

This statement as to the meaning and scope of the famous phrase has been repeatedly quoted with approval by this court, as will be seen by reference to the following cases: *United States* v. *Cruikshank*, 92 U. S. 542, 554; *Hurtado* v. *California*, 110 U. S. 516, 527; *Caldwell* v. *Texas*, 137 U. S. 692, 697; *Scott* v. *McNeal*, 154 U. S. 34, 45; *Taylor and Marshall* v. *Beckham*, 178 U. S. 548, 592.

26774

Mr. Chief Justice Fuller in *Giozza* v. *Tiernan*, 148 U. S. 657, 662, said, speaking for the court:

> "And *due process of law* within the meaning of the amendment is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

See also *Duncan* v. *Missouri*, 152 U. S. 377, 382; *Thomas* v. *Gay*, 169 U. S. 264, 283; *Norwood* v. *Baker*, 172 U. S. 269, 279.

The court has never attempted to define the provision 'due process of law,' with precision and probably never will, any more than it would attempt to define the word 'justice' in the preamble to the Constitution; but nevertheless the phrase has constantly been recognized as embodying fundamental principles of right and justice which protect the individual from the arbitrary exercise of any power of government. As Mr. Justice Brown said in *Holden* v. *Hardy*, 169 U. S. 366, 389:

> "This court has never attempted to define with precision the words 'due process of law,' nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard."

It is true that the cases in this court applying to taxation the constitutional guaranty of 'due process of law' arose under the Fourteenth Amendment and related to state laws; but, after the most careful study and reflection, no reason can be perceived why the very same provision in the Constitution should have one meaning when applied to the state governments and a narrower meaning and more limited scope when applied to the national government. *Sinking-Fund*

Cases, 99 U. S. 700, 718. Logically, if there could be in reason and justice any difference, it should be against the national government, which is indisputably one of limited and enumerated powers. Cooley on Taxation, p. 12. The only sound principle must be that the provision is the same in both cases as applied to the taxing power (Mr. Justice Harlan dissenting in *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324, 355).

If it appeared that the State in a given case could not, under the police power, prohibit or destroy commerce in a particular commodity, and was simply exercising the taxing power, it is submitted that a tax upon a commodity, which amounted to practical confiscation or prohibition of its manufacture and sale, would clearly deprive the individual of property and liberty without due process of law within the meaning of the Fourteenth Amendment. In the *Powell* case as well as in the *Plumley* case it was recognized that a statute under the police power which prevented all sales in a legitimate article of commerce would not be valid. *Powell* v. *Pennsylvania*, 127 U. S. 678, 685; *Plumley* v. *Massachusetts*, 155 U. S. 461, 467.

Mr. Justice Harlan, in the opinion of the court in the *Lottery Case* (at p. 363) recognized that, in the exercise of the power to regulate commerce among the several States, Congress could not act arbitrarily, but was "subject to the limitations imposed by the Constitution upon the exercise of the powers granted," and there is no reason to suppose that the learned justice did not mean to refer particularly to the most comprehensive and far-reaching of all limitations embodied in the constitutional guaranty of 'due process of law.' In *Inter-*

state Commerce Comm. v. *Brimson*, 154 U. S. 447, 479, the learned justice also said: "It is scarcely necessary to say that the power given to Congress to regulate interstate commerce does not carry with it any power to destroy or impair those guaranties." The very same reasoning must apply to the exercise of the taxing power.

Assuming, for the reasons above stated, that the restrictive clause of the Fifth Amendment applies to the exercise of the taxing power, then its prohibition or limitation should be enforced in its spirit and to its entirety as fully as if it were part of the very article conferring the taxing power. *Prout* v. *Starr*, 188 U. S. 537, 543. As Mr. Justice Brewer said in the case of *Fairbank* v. *United States*, 181 U. S. 283, 288:

> "We are not here confronted with a question of the extent of the powers of Congress but one of the limitations imposed by the Constitution on its action, and it seems to us clear that the same rule and spirit of construction must also be recognized. If powers granted are to be taken as broadly granted and as carrying with them authority to pass those acts which may be reasonably necessary to carry them into full execution; in other words, if the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power of Congress, that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally construed and that language of restriction is to be narrowly and technically construed. Especially is this true when in respect to grants of powers there is as heretofore noticed the help

found in the last clause of the eighth section, and no such helping clause in respect to prohibitions and limitations. The true spirit of constitutional interpretation in both directions is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose."

The act of Congress of May 9, 1902, purports to levy what is strictly and technically an excise upon the manufacture and sale of an article of food. *Patton* v. *Brady, Executrix*, 184 U. S. 608, 618. An *excise* is generally included in the term *tax* which, "in its most enlarged sense, embraces all the regular impositions made by government upon the person, property, privileges, occupations, and enjoyments of the people for the purpose of raising public revenue. . . . Taxes are distinguished from arbitrary levies in that they are laid according to some rule which apportions the burden between the subjects thereof. An exaction which is made without regard to any rule of apportionment is therefore not a tax, and is not within the constitutional authority of the government."[1] Chief Justice Marshall defined 'taxation' to be "the simple operation of taking small proportions from a perpetually accumulating mass, susceptible of almost infinite division."[2] What would he have said of an alleged tax which took all?

There is undoubtedly a difference between a land or property tax and an excise upon a business or upon the manufacture and sale of a commodity. An excise may be upon the article, or its value, or its quality, or its quantity, or its weight; but however the amount be determined, whether by specific or *ad valorem* taxes or

[1] *Cooley's Pr. Const. Law*, Third ed., p. 56.
[2] *Gibbons* v. *Ogden*, 9 Wheat. 1, 199.

duties, or both methods, although it need not be inherently equal, it must operate alike on all persons within the class selected or who exercise the same privilege.

The most satisfactory definition of an excise is to be found in the Massachusetts reports. It is true that the Massachusetts constitution requires excises to be 'reasonable,' but the following definition is not therefore without general application. A leading case is that of *Oliver* v. *Washington Mills*, 11 Allen, 268, 274, 279, where Bigelow, C. J., speaking for the Supreme Judicial Court, said:

> "An excise, on the other hand, is of a different character. It is based on no rule of apportionment or equality whatever. It is a fixed, absolute and direct charge laid on merchandise, products or commodities, without any regard to the amount of property belonging to those on whom it may fall, or to any supposed relation between money expended for a public object and a special benefit occasioned to those by whom the charge is to be paid. . . . It only remains for us to consider whether the assessments laid on the defendants can be supported as a valid exercise of the power to impose excises. . . . In the first place, it is grossly unequal, and does not operate alike on all persons whose property is made subject to it. It was declared by this court in *Portland* v. *Apthorp*, *ubi supra*,[1] that 'Taxes of this sort must undoubtedly be equal'; that is, must operate alike on all persons who exercise a particular employment or enjoy the same privilege or commodity. The same doctrine was affirmed in the recent case of *Commonwealth* v. *People's Savings Bank*, *ubi supra*.[2] The reason is obvious. In the language of the court, an unequal excise would be 'contrary to the principles of justice.' That the excise in ques-

[1] 12 Mass. 252, 255.

[2] 5 Allen, 431.

tion operates unequally in this sense cannot be doubted."

This definition of an excise was cited by the Attorney-General of the United States (Hon. Charles Devens) in the opinion furnished to Congress for its guidance (15 Op. Attys.-Gen., p. 219), adding that such an excise "may be increased or diminished by the extent to which the privilege is exercised."

Assuming that an excise must operate alike on all persons whose property or business selected for taxation is substantially the same in character, and that an arbitrary and discriminating excise would be 'contrary to the principles of justice' and would not constitute 'due process of law,' it remains to consider whether the excise now before the court is arbitrary and discriminating as contended by the plaintiffs in error.

The act of Congress purports to lay an excise tax upon oleomargarine. Congress, of course, knew, as its very definition discloses, that oleomargarine was a substitute for butter and that this quality and essence alone gave it commercial value or utility. The act imposes a tax of ten cents per pound upon yellow oleomargarine, which is shown to be prohibitive, and under the authorities above discussed such prohibitive operation must be presumed to have been the purpose of Congress. For all legitimate purposes of taxation, oleomargarine, whether colored or uncolored, is practically the same thing, and there are no inherent differences between them which would warrant their separation into two distinct classes. In the nature of things, reasoning solely according to the rules which should govern the imposition of taxes, white

oleomargarine ought not to be taxed one-quarter of a cent a pound and yellow oleomargarine forty times as much, and, in the absence of some ulterior motive, such discrimination would never have been attempted. No conceivable reason can be suggested for the discrimination based alone upon the yellow color, other than that it competes with another and *untaxed* article of commerce, namely, butter. On the very face of the act, it is declared that this discrimination of nearly four thousand per cent. in the amount of the tax imposed is made solely because oleomargarine in its commercial form looks like butter. Such legislation, it is submitted, is just as arbitrary and indefensible as if Congress were to endeavor to lay a capitation tax upon men of red hair, and it were to be argued in support of such a law that it was constitutional because apportioned.

It cannot be denied that the tax on yellow oleomargarine in the case at bar is an extraordinary piece of legislation, unusual in our system of government, and of a kind heretofore happily rare. On its face, it imposes an enormous and disproportional penalty upon the mere fact of coloring a wholesome and nutritious article of food, whilst another competing food product, practically the same substance produced in a different way, is left untaxed. The proof shows that in its practical operation the necessary effect of the discrimination is the destruction of an industry conducted within the jurisdiction of a State, by which the plaintiffs in error and thousands of others are deprived of a means of livelihood in a legitimate trade.

When we say that the federal tax on oleomar-

garine is arbitrary, we do not mean to say that Congress was actuated by no reason in making the discrimination. We concede that it had a reason and sought to accomplish a definite object, namely, to prevent the manufacture and sale of yellow oleomargarine because it looks like and competes with colored butter; but what we do mean to assert is that it was actuated by no reason which, under the Constitution of the United States, it could properly entertain, for in respect of internal commerce it has no police power whatever. A commodity cannot be taxed at a prohibitive rate simply because it necessarily resembles and competes with another. Such a reason furnishes no legitimate basis for the object sought to be accomplished. Even under the police power, a State could not prohibit an article harmless in itself merely because it looked like another with which it competes: it could only do so in order to prevent fraud.

Now, the power to tax undoubtedly involves the power to classify for purposes of taxation; but due process of law requires that classification shall be something more than mere arbitrary selection. What test then is to be applied for the determination of whether there has been legitimate classification or a mere arbitrary selection? Whatever else may be done, it must surely be that discrimination calculated only to deprive one class of persons of their occupations or property for no other purpose than to benefit another class of persons who are their business competitors is, legally speaking, a mere arbitrary selection. Thus, in the cases at bar, we find a tax of ten cents per pound upon

oleomargarine solely because it looks like and competes with butter, which is exempted from any tax. The tax depends solely upon the article being a substitute for an untaxed commodity. What difference then exists between these two articles to justify this discrimination? In their chemical composition there is substantially no difference and they are used for the same identical purpose. They compete directly in the market, but a necessary element of the marketability of each product is a certain shade of yellow which must be imparted before it can be sold. The cost of production is such that yellow oleomargarine cannot be sold in competition with colored butter if the ten cent tax be paid. Since uncolored oleomargarine cannot be sold or compete with colored butter, the result is the prohibition of the manufacture and sale of all oleomargarine in competition with butter. Therefore, the mere fact of necessary resemblance is made to support the accomplishment of but one object, namely, the suppression of the oleomargarine industry for the benefit of the butter industry. No such power was entrusted to Congress by the Constitution. It is not legitimate classification, but mere arbitrary selection which deprives of liberty and property one body of individuals for the benefit of another. As Mr. Justice Harlan said of a state statute in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 563:

> "Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates."

What Mr. Justice Brewer said in *Gulf, Colorado & Santa Fe R'y* v. *Ellis*, 165 U. S. 150, 154, is equally applicable to the Fifth Amendment, viz.:

> "While good faith and a knowledge of existing conditions on the part of a legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the Fourteenth Amendment a mere rope of sand, in no manner restraining state action. . . . The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

In *The State* v. *Loomis*, 115 Missouri, 307, 314, cited and quoted with approval in the *Ellis* case, Black, J., said:

> "Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations. Thus the legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classi-

fication for such a purpose would be arbitrary and a piece of legislative despotism, and therefore not the law of the land."

It is no longer open to question that the right to earn one's livelihood by any lawful calling constitutes the liberty and property of the individual and one of the inalienable privileges and immunities of every citizen of the United States which are secured by the Constitution. *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 757, 764; *Powell* v. *Pennsylvania*, 127 U. S. 678, 684; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589; *People* v. *Marx*, 99 N. Y. 377, 386, and *People* v. *Gillson*, 109 N. Y. 389, 399.

The contention of the plaintiffs, if adopted, would not limit the taxing power of the federal government. It would leave it free to determine the extent and method of taxation in all cases where taxation is necessary and proper to carry into execution the powers delegated by the Constitution, and to call upon the people to contribute even to the last penny if necessary to defend or preserve the Union or promote the common welfare of the Nation. It would take away no power that a civilized government ought to exercise. It would declare that in the exercise of the taxing power Congress may not impose prohibitory taxes upon internal products based upon the fact that a manufactured article resembles and competes with another product which is not taxed; in other words, that it may not destroy the property of one class of its citizens for the benefit of another class. Such a decision would be but following the duty which Chief Justice Marshall said would be imperative if the court were satisfied that a given stat-

ute purporting to lay a tax was in truth a mere pretext for unauthorized prohibition.

IV.

THE PROVISION OF SECTION 14 OF THE ACT CONFERRING JUDICIAL POWER UPON THE COMMISSIONER OF INTERNAL REVENUE.

The act in question is subject to the additional objection that the power to decide finally what articles are to be taxed cannot be conferred upon the Commissioner of Internal Revenue, who is only an administrative officer. Sec. 14 of the act provides as follows:

> "And such Commissioner is authorized to decide what substances, extracts, mixtures, or compounds which may be submitted for his inspection in contested cases are to be taxed under this act; and his decision in matters of taxation under this act shall be final."

The invalidity of this clause would seem to be established by the decision in *United States* v. *Eaton*, 144 U. S. 677, 688, where the court, speaking through Mr. Justice Blatchford, said:

> "It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue, as a needful regulation under the oleomargarine act, for carrying it into effect, could be considered as a thing 'required by law' in the carrying on or conducting of the business of a wholesale dealer in oleomargarine, in such manner as to become a criminal offence punishable under § 18 of the act."

See also to the same effect, *United States* v. *Maid*, 116 Fed. Rep. 650, 651; *United States* v. *Blasingame*, 116 Fed. Rep. 654.

The case of *In re Kollock, Petitioner*, 165 U. S. 526, 533, did not present this point. That decision passed

only upon the power of Congress to authorize the Commissioner of Internal Revenue to prescribe regulations as to marks, stamps and brands. An entirely different question is involved in the attempt to invest the Commissioner with power to 'decide' *finally* how an article shall be taxed. No such judicial power can be granted except to the courts.

This objection is peculiar to the *Cliff* and *McCray* cases. In the *Cliff* case, the package bore a tax-paid stamp of one-fourth of one cent per pound (*Cliff* record, p. 8). The theory of the prosecution was that the package had not been "stamped according to law," within the penal intent of section 11 of the act, because it did not have a tax paid stamp at the rate of ten cents per pound, under the requirements of section 8. The theory of the defense was that the tax required by section 8 on the package in evidence was only one-fourth of one cent per pound, because the oleomargarine was "free from artificial coloration that causes it to look like butter of any shade of yellow." The issue, therefore, was as to whether or not the package in question contained 'artificial' coloration within the true meaning of the act of Congress. Upon this issue the facts were undisputed. The government showed that the article was of the color of June butter, and that this color was imparted to it by the admixture of palm oil in its manufacture (*ib.*, p. 8). The defendant showed by competent testimony that palm oil is a vegetable oil derived from the fruit of a certain kind of palm which grows in East Africa, that it is a wholesome, edible oil, containing all the chemical constituents of butter, except butyrin, which gives to butter its flavor, that it is used by the natives of

the country where it is produced to mix with their food, that it is reddish-yellow in appearance and a very small proportion of it is sufficient to produce the color of June butter, that there is little, if any, difference between the taste of oleomargarine made in this way and the taste of butter, that it is quite as digestible as butter and is very cheap, that the oleomargarine thus produced is substantially the same article as good butter, and that the nature of palm oil is such that its use *is desirable as an ingredient in the manufacture of oleomargarine aside from its yellow color* (*ib.*, pp. 10–12). The government made no objection to this evidence, and offered none to question or dispute it (*ib.*, p. 12), except to show that the Commissioner of Internal Revenue had finally decided that the use of palm oil in the manufacture of oleomargarine does constitute 'artificial' coloration, and had instructed the prosecuting witness, a Deputy Collector of Internal Revenue, that oleomargarine thus produced is subject to the tax of ten cents per pound (*ib.*, pp. 8–10).

The facts being wholly undisputed, there was presented a pure question of law, namely, whether the admixture of palm oil in the manufacture of oleomargarine constituted 'artificial' coloration within the meaning of the act. The conviction necessarily was based upon the assumption that this question had been foreclosed by the decision of the Commissioner under authority of section 14, and that the defendant Cliff was not entitled to a judicial trial upon the question whether the article he sold was or was not intended by Congress to be taxed at the ten cent rate.

In the *McCray* case it was admitted by the govern-

ment that the only coloring matter contained in the package of oleomargarine therein involved was that universally used in the United States to color butter and was contained in creamery butter which had been purchased in the open market and used in the manufacture of the oleomargarine in question as one of its elementary and necessary ingredients according to a formula used in the course of business. The Commissioner of Internal Revenue had decided that if *artificially* colored butter is used "as a component part of the finished product oleomargarine (and that finished product looks like butter of any shade of yellow), as the oleomargarine is not free from *artificial* coloration, the tax of ten cents per pound will be assessed and collected." Oleomargarine Regulations, U. S. Int. Rev., June, 1902, p. 18.

Conceding *arguendo* that Congress would have the power to tax oleomargarine containing palm oil or colored butter at ten cents per pound, nevertheless it could not authorize the Commissioner of Internal Revenue so to decide and to tax or not to tax according to his discretion. He is not a judicial officer; he has no judicial machinery; he need not even be a lawyer; he may act upon such facts as may be presented to him, and after such investigation as he may choose to make, and his decision is not subject to judicial review; indeed, he may decide on mere inspection and hence according to the hidden operation of his senses. Though Congress may invest the officers of the executive department of the government with all of the powers necessary to the adequate execution of its

constitutional laws and may confer upon them the power to determine the existence of facts as the foundation of such action as may be necessary to give effect to the declared purpose of Congress, it cannot delegate to any officer or department of government the power to 'decide' finally what articles shall or shall not be taxed.

According to the ruling of the Commissioner, the word 'artificial' is made to include 'natural,' a word of opposite meaning, for it is undisputed that the yellow color of palm oil is a *natural* color, and the exception would be, not of oleomargarine 'free from artificial coloration' but of oleomargarine 'free from coloration.' The established rule is that the intention to tax in a particular manner must be expressed in clear and unambiguous language, else it cannot be enforced, and that words of exception are to receive a liberal rather than a restricted construction, to the end that the burdens imposed upon individuals may be confined rather than extended. The rule together with its supporting authorities is stated in *Eidman* v. *Martinez*, 184 U. S. 578, 583. See also *Adams* v. *Bancroft*, 3 Sumner, 384, 387; *Schoenemann* v. *United States*, 119 Fed. Rep. 584, 587; *In re Southern Pac. Co.*, 82 Fed. Rep. 311, 313; 87 Fed. Rep. 863; *Matheson & Co.* v. *United States*, 71 Fed. Rep. 394, 395; *Rice* v. *United States*, 53 Fed. Rep. 910, 911; *Dean* v. *Charlton*, 27 Wis. 522, 526.

It is not contended that the invalidity of this provision contained in section 14 affects the other provisions of the act. Omitting the clause or declaring the legal

26782

effect to be that the ruling of the Commissioner is only presumptively correct, will leave the act complete and harmonious. To the individual, however, will then be accorded a trial in due form upon the issue whether palm oil or any other natural product or colored butter does or does not constitute 'artificial coloration' within the true meaning of the statute. Upon that question, we have been denied a day in court; and, acting as an appellate tribunal, this court will not determine that issue but order it to be tried by the court below in accordance with the usual practice.

V.

EFFECT OF THE INVALID AMENDMENT UPON THE ORIGINAL ACT.

The power of Congress to lay a tax of two cents per pound upon oleomargarine, as was done under section 8 of the original oleomargarine act, is not questioned in these cases. It is true, in the *Broadwell* case, no tax whatever had been paid; but this was upon the ground that the amendment of May 9, 1902, being void, no tax provision remained in force. This was done for the purpose of presenting every phase of the act, and not because the plaintiffs in error are not willing to pay a fair tax to the national government. Although an unconstitutional statute cannot, by mere implication alone, operate to repeal a prior enactment, still an expression of such an intention may as well be contained in an unconstitutional statute as any

other. *Tims* v. *The State*, 26 Ala. 165, 170; *County of Orange* v. *Harris*, 97 Cal. 600, 602; *People ex rel.* v. *Fleming*, 7 Colo. 230, 236; *Meshmeier* v. *State*, 11 Ind. 482, 489; *Childs* v. *Shower*, 18 Iowa, 261, 272; *Ely* v. *Thompson*, 3 A. K. Marsh. 70, 73; *Sullivan* v. *Adams*, 3 Gray, 476, 478; *Campau* v. *The City of Detroit*, 14 Mich. 276, 285; *Devoy* v. *Mayor, &c., of New York*, 35 Barb. 264, 270; 36 N. Y. 449, 451; *City of Portland* v. *Schmidt*, 13 Oreg. 17, 20; *Shepardson* v. *Milwaukee and Beloit R. Co.*, 6 Wis. 605, 615; *State ex rel. Rogers* v. *Judge of County Court*, 11 Wis. 50, 55. And a declaration that a prior statute is amended to read in the language of the amendatory statute amounts to an unequivocal expression of an intention to repeal the original act so far as concerns any vitality distinct from the amendatory act. *People* v. *Wilmerding*, 136 N. Y. 363, 369, per Mr. Justice Peckham; *Matter of Estate of Prime*, 136 N. Y. 347, 355; *Goodno* v. *City of Oshkosh*, 31 Wis. 127, 129. Congress cannot be held to have intended to prohibit oleomargarine provided the Constitution will permit it to do so and by the same act to tax it in case the prohibition were unconstitutional. To so hold would be judicial legislation. *Spraigue* v. *Thompson*, 118 U. S. 90, 94; *James* v. *Bowman*, 190 U. S. 127, 141.

Conclusion.

It results that sections 8 and 14 of the act of Congress of August 2, 1886, as amended by the act of Congress of May 9, 1902, should be declared unconstitutional for

26783

the reasons above discussed, and that the judgment in each case should be reversed.

WILLIAM D. GUTHRIE,
MILLER OUTCALT,
CHARLES E. PRIOR,
FRANCIS J. KEARFUL,
DELAVAN B. COLE,
CHARLES C. CARNAHAN,
For plaintiffs in error.

Washington, October Term, 1903.

FILE COPY.

26784

OLEOMARGARINE TAX CASES.

Supreme Court of the United States.

October Term, 1903.

Office Supreme Court U. S.
FILED
OCT 10 1903
JAMES H. McKENNEY,
Clerk.

LEO W. McCRAY,
Plaintiff in Error,
vs.
THE UNITED STATES,
Defendant in Error.

No. 301.

BRIEF FOR PLAINTIFF IN ERROR.

MILLER OUTCALT,
CHARLES E. PRIOR,
Counsel for Plaintiff in Error.

W. H. ANDERSON & Co., Law Publishers, Cincinnati, Ohio.

26785

Supreme Court of the United States.

October Term, 1903.

LEO W. McCRAY,
Plaintiff in Error,

vs.

THE UNITED STATES,
Defendant in Error.

No. 301.

BRIEF FOR PLAINTIFF IN ERROR.

This is a civil action for debt for the recovery of the penalty provided for in Section 11 of the Act of Congress approved August 2, 1886, as amended May 9, 1902, and which section reads as follows:

> "Section 11: That every person who knowingly purchases or receives for sale any oleomargarine which has not been branded or stamped according to law shall be liable to a penalty of fifty dollars for each such offense."

The action was commenced, as disclosed by the record, by the filing of a petition in the United States District Court for the Southern District of Ohio, Western Division.

The petition is in the ordinary form, and seeks by its averments to charge the defendant with a violation, on October 22, 1902, of the provisions of Section 8 of said Act of August 2, 1886, as amended by Section 3 of the Act of May 9, 1902, in that the defendant did, on said day, purchase and receive for sale, twenty pounds of oleomargarine, which is alleged by said petition to have been "not free from artificial coloration" and did contain "additional coloring matter that caused it to look like butter of a certain shade of yellow," and which said oleomargarine had only been stamped by affixing internal revenue stamps of the value and at the rate of one-fourth cent per pound, whereas, it is alleged, the same should have been stamped according to law by affixing thereto internal revenue stamps of the value and at the rate of ten cents per pound, and that by reason thereof said defendant became and is liable by reason of the premises to a penalty of fifty dollars for such offense under and by virtue of the provisions of Section 11, quoted above; and for which sum plaintiff prays judgment.

The answer of the defendant, after making certain formal admissions of averments made in the petition, contains two separate and distinct defenses.

FIRST DEFENSE.

Defendant says that on the 24th day of October, 1902, being a retail dealer in oleomargarine, as alleged in plaintiff's petition and hereinbefore admitted, and having paid the tax of six dollars imposed and required as hereinbefore alleged and admitted, he did, with full knowledge of the facts in relation thereto, purchase and receive for sale in the course of his business, and at his place of business in the City of Cincinnati, a package containing 20 pounds of oleomargarine from the said

The Ohio Butterine Company, corporation as aforesaid; that said oleomargarine had been manufactured, compounded and prepared for sale by said corporation from a formula used by it, in the course of its business, and known as "high grade" and contained the following ingredients, in the proportions given, and none other, that is to say: Oleo oil, 20 pounds; neutral lard, 30 pounds; creamery butter, 50 pounds; milk and cream, 30 pounds; common salt, 7 pounds; that said oleomargarine, though containing only the ingredients named, was of a yellow color; that said yellow color in said finished article of oleomargarine was imparted to it by the use, employment and introduction in the manufacture thereof, as one of the constituent, elementary and necessary ingredients and parts thereof, of said fifty pounds of creamery butter; that said creamery butter was purchased in the open market and was the food product usually known as butter and which is made exclusively from milk or cream or both, as defined in Section 1 of the Act of Congress of August 2, 1886, to wit: "That for the purpose of this act the word 'butter' shall be understood to mean the food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter;" that said creamery butter so purchased and used in the manufacture of said oleomargarine was of a rich yellow color; that said color was derived from the use, as an ingredient in its manufacture, of a substance known as Wells-Richardson's Improved Butter Color, a substance universally used in the United States in the manufacture of butter, for the purpose of imparting a deep yellow color; that the same is neither harmful nor injurious for human consumption; that no additional or other coloring matter of any kind whatever was used or introduced into the finished product of oleomargarine by the said The Ohio Butter-

ine Company; that the oleomargarine so purchased and received by the defendant was wholesome and nutritious, and free from any deleterious or injurious ingredient.

Defendant further says that the said The Ohio Butterine Company, manufacturers of said package of oleomargarine, from which said package was purchased and received as aforesaid, had paid the special tax imposed and required by the acts of Congress relating to butter and oleomargarine, and had otherwise conducted its business in compliance with all the requirements of said acts; that said package so purchased and received by the defendant as aforesaid, had been packed, marked, stamped, branded and labeled in compliance with all the provisions of said acts and with all the regulations thereunder prescribed by the Commissioner of Internal Revenue and the Secretary of the Treasury.

Defendant admits that said package of oleomargarine at the time he so purchased and received it, had been stamped by affixing internal revenue stamps thereto of the value and at the rate of one-fourth of one cent per pound, but denies that the same was not stamped according to law, or otherwise in violation of the provisions of Section 3 of the Act of May 9, 1902.

Defendant had full knowledge of the character and condition of said package of oleomargarine, both as to the ingredients it contained and the amount of tax paid thereon.

Defendant further says that the cost of manufacture of wholesome and nutritious oleomargarine like that contained in said package is such that it can not be sold in competition with butter if the tax of ten cents per pound be imposed and paid.

The color of high grade oleomargarine manufactured as aforesaid, by the use and introduction of said creamery butter, as one of the necessary and essential ingredients in the manufacture thereof, was of a light shade of yellow and not of the same deep yellow color possessed by said creamery butter. The

natural color of butter at the time of the alleged offense was of a lighter shade of yellow than that made in the spring season and nearly white, and of a lighter shade than the taste of butter consumers in the United States demands. The butter of trade and commerce is artificially colored by the use of said Wells-Richardson's butter color or other similar substance in order to impart a deeper shade of yellow. There is little demand in the United States for either butter or oleomargarine which is not of the deep yellow shade of said spring butter.

SECOND DEFENSE.

For a second defense to the petition this defendant says, that the act of Congress relating to butter and oleomargarine of August 2, 1886, as amended by the act of Congress of May 9, 1902, in so far as it imposes a tax of ten cents per pound upon oleomargarine containing "artificial coloration that causes it to look like butter of any shade of yellow," and in so far as it authorizes the Commissioner of Internal Revenue "to decide what substances, extracts, mixtures or compounds which may be submitted for his inspection in contested cases are to be taxed under this act," and provides that "his decision in the matter of taxation under this act shall be final," is in contravention of the Constitution of the United States and of the amendments thereto, and is illegal and void, for the following reasons, to wit:

(1) The act deprives the defendant of his property without due process of law.

(2) The act is an unwarranted encroachment upon and interference with the police powers reserved to the several states and to the people of the United States.

(3) The act invests an inferior executive officer with the power, finally and arbitrarily, to determine an essentially judicial question concerning vast property rights.

(4) The act so arbitrarily discriminates against oleomargarine in favor of butter as to destroy the oleomargarine industry for the benefit of the butter industry in the United States, and is thus repugnant to those fundamental principles of equality and justice which are inherent in the Constitution of the United States.

The defendant in error (plaintiff below) demurred to the answer of plaintiff in error (defendant below) which demurrer was sustained.

ASSIGNMENT OF ERRORS.

The District Court erred in sustaining the demurrer of the United States to the answer of plaintiff in error (defendant below).

The District Court erred in refusing to hold that the act of Congress, approved August 2, 1886, as amended by the act of Congress, approved May 9, 1902, is in contravention of the Constitution of the United States of America and of the amendments thereto, and is illegal and void, for the reasons

(a) The act deprives the defendant of his property without due process of law.

(b) The act is an unwarranted encroachment upon and an interference with the police powers reserved to the several states and to the people of the United States.

(c) The act so arbitrarily discriminates against oleomargarine in favor of butter as to destroy the oleomargarine industry for the benefit of the butter industry in the United States, and is thus repugnant to those fundamental principles which are inherent in the Constitution of the United States.

The District Court erred in holding, if said act be not in contravention of the Constitution of the United

States, that oleomargarine which contains no artificial coloration than that imparted to it by the use of butter which itself contains coloring matter and which therefore causes said oleomargarine to look like butter of a shade of yellow, is subject to a tax of ten cents per pound instead of a tax of one-fourth of one cent per pound.

ARGUMENT.

I

It is admitted and not denied, that the action was properly instituted, and no challenge was made to the jurisdiction of the District Court.

U. S. Revised Statutes, Section 563 provides as follows:

"Sec. 563. The District Courts shall have jurisdiction as follows:

* * * * * * * *

"Third. Of all suits for penalties and forfeitures incurred under any law of the United States."

The Federal Courts have jurisdiction of suits brought by the United States without regard to the amount in controversy.

U. S. vs. Sayward, 160 U. S., 493.

"Suits for penalties and forfeitures" mean *civil actions* for the recovery of the penalty and forfeiture.

U. S. vs. Mann, 1 Gall., 177.

U. S. vs. Bromley, 12 How., 88.

"The action of debt lies for a statutory penalty, because the sum demanded is certain, but though in form *ex contractu*, it is founded in fact upon a tort."

Chaffee vs. U. S., 18 Wall., 516.

This cause is properly cognizable by this court upon writ of error direct from the District Court because the constitutionality of a law of the United States is drawn in question.

Act of March 3, 1891, 26 U. S. Stat., 827, Section 5.

II.

The act, whose validity is challenged by the plaintiff in error, as being an unconstitutional enactment, is the act of Congress, approved May 9, 1902, and entitled "An act to make oleomargarine and other imitation dairy products, subject to the laws of any state or territory or the District of Columbia, into which they are transported, and to change the tax on oleomargarine, and to impose a tax, provide for the inspection, and regulate the manufacture and sale of certain dairy products, and to amend an act entitled 'An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine,' approved August 2, 1886."

Under the contention of the plaintiff in error upon this argument, and on the second defense set out in his answer, the validity of Section 3 of the Act of May 9, 1902 is especially challenged. This section provides as follows:

"Section 3. That Section 8 of an act entitled 'An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine,' approved August 2, 1886, be, and the same is hereby, amended so as to read as follows:

"Section 8. That upon oleomargarine which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected a tax of ten cents per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound: Provided,

when oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow, said tax shall be one-fourth of one cent per pound."

III.

THE RULE FOR CONSTRUING THIS STATUTE.

In the construction of the statutory or local laws of a state, it is frequently necessary to recur to the history and situation of the country in order to ascertain the reason, as well as the meaning, of many of the provisions in them, to enable a court to apply, with propriety, the different rules for construing statutes.

Preston v. Browder, 1 Wheaton, 121.

* * * We must gather their intention (i. e., members of congress) from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed.

Aldridge v. Williams, 3 Howard, 24.

In construing an act of Congress, the court may recur to the history of the time when it was passed, in order to ascertain the reason for, as well as the meaning of, particular provisions in it; but the views of individual members in debate, or the motives which induced them to vote for or against its passage, cannot be considered.

United States v. Union Pacific R. R. Co., 91 U. S., 72.

In endeavoring to ascertain what the Congress of 1862 intended, we must, as far as possible, place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances.

Platt v. Union Pacific R. R. Co., 99 U. S., 48, 64.

The two foregoing cases are cited and approved in

Smith v. Townsend, 148 U. S., 494, 495.
R. R. Co. v. Tennessee, 153 U. S., 502.

Even in construing the terms of a statute, courts must take notice of the history of legislation, and, out of different possible constructions, select and apply the one that best comports with the genius of our institutions and, therefore, most likely to have been the construction intended by the law-making power.

R. R. Co. v. Inter State Com. Com., 162 U. S., 218.

* * * The only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed.

U. S. v. Freight Ass'n., 166 U. S., 318.

"In whatever language a statute may be framed, its purpose and its constitutional validity must be determined by its natural and reasonable effect."

Henderson vs. Wickham, 92 U. S., 259.

"When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several states or with the Indian tribes. If not so limited, it is in excess of the power of Congress,"

Trademark Cases, 100 U. S., 82, 96.

(*Syllabus.*) "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and the presumption that it was enacted in good faith, for the purpose expressed in the title, cannot control the determination of the question whether it is, or is not, repugnant to the Constitution of the United States."

(*Opinion.*) "The presumption that this statute was enacted in good faith, for the purpose expressed in the title, namely, to protect the health of the people of Minnesota, cannot control the final determination of the question whether it is not repugnant to the Constitution of the United States. There may be no purpose upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution. In such cases, the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void. This principle of constitutional interpretation has been often announced by this Court. In Henderson, etc., vs. New York, etc., 92 U. S., 259, 268, where a statute of New York imposing burdensome and almost impossible conditions on the landing of passengers from vessels employed in foreign commerce, was held to be unconstitutional and void as a regulation of such commerce, the court said that 'in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.' In People vs. Campagnie Generale Transatlantique, 107 U. S., 59, 63, where the question was as to the validity of a statute of the same State, which was attempted to be supported as an inspection law authorized by Section 10 of Article 1 of the Constitution, and was so designated in its title, it was said: 'A State cannot make a law designated to raise money to support paupers, to detect or prevent crime, to guard against disease and to cure the sick, an inspection law, within the constitutional meaning of that word, by calling it so in the title. So, in Soon Hing v. Crowley, 113 U. S., 705, 710. The rule is general, with reference to the enactments of all legislative bodies, that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as to the purposes they had in view, will always be presumed to be

to accomplish that which follows as the natural and reasonable effect of their enactments.' In Mugler vs. Kansas, 123 U. S., 623, 661, the Court, after observing that every possible presumption is to be indulged in favor of the validity of a statute, and that the judiciary must obey the Constitution rather than the law-making department of the government, and must, upon its own responsibility, determine whether, in any particular case, the limits of the Constitution have been passed. It was added: 'If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to these objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution. Upon the authority of those cases, and others that could be cited, it is our duty to inquire, in respect to the statute before us, not only whether there is a real or substantial relation between its avowed objects and the means devised for attaining those objects, but whether by its necessary or natural operation it impairs or destroys rights secured by the Constitution of the United States.' * * * Our duty to maintain the Constitution will not permit us to shut our eyes to these obvious and necessary results of the Minnesota statute. If this legislation does not make such discrimination against the products and business of other states in favor of the products and business of Minnesota as interferes with and burdens commerce among the several states, it would be difficult to enact legislation that would have that effect."

Minnesota vs. Barber, 136 U. S., 313.

We may also, with propriety, call to our aid in interpreting this statute, the debates in Congress when this act was under discussion. A reference to them, will not be altogether uninteresting, but, on the contrary, illustrative of the history of this law and the condition of the country and existing legislation at the time it was passed.

That it was not a revenue measure, but designed for an altogether different purpose, it is not out of place to advert to an overflowing treasury and the expediency which this same Congress felt in reducing the revenue derived under the Span-

ish War acts, in this same year, by an amount equal to seventy millions of dollars.

By reference to the speeches of Senator Spooner and Senator Dolliver, who were the champions of the measure in the Senate, it will at once appear that the validity of the law was then challenged upon the ground that it was avowedly not a revenue measure, but a police regulation—a thing which Congress was without power to enact.

> Congressional Record, 57 Congress, First Session.
> Senator Dolliver, pp. 3273 to 3277.
> Senator Spooner, pp. 3505 to 3506, 3560 and 3563, 3601 and 3606.

We desire especially to call the Court's attention to the argument made by Senator Hoar, found on pages 3280 and 3281 of the same record. To our minds it is potent in illustrating just what we claim to be the infirmity of the bill as it was finally enacted into law. Senator Hoar says in no doubtful terms, that;

"This ten cents a pound is a tax not on oleomargarine, but on fraud or false coloring. It does not touch the product of the manufacturer of oleomargarine, and his product of oleomargarine is not taxed under this bill when we come to the last analysis. It is the fraud, the coloring to make it look like butter, that we are putting the tax on."

And again,

"This tax is in substance on the fraud, and not on the manufacture."

The following presents a still different view:

"Mr. Bacon.—I understand the Senator from Massachusetts to base his support of the bill upon the proposition that this tax on colored oleomargarine is justifiable in order to protect the other tax. In other words, this tax of ten cents a pound is justifiable in order to protect the government in the collection of the two cent

tax or the one-fourth cent tax, as the case may be. The question I want to ask the learned Senator is this: If there were no two cent or quarter cent tax, would there be any ground upon which he could base the constitutionality of this act?"

"Mr. Hoar.—I think not."

We are not unmindful of the rule that the motives of Congress in passing the law cannot be called in question by the Judicial Department of the Government, but we insist that on the face of this law itself it is perfectly apparent that the tax of ten cents a pound on colored oleomargarine can have no other operation or effect than to usurp the police power which did not belong to Congress. The ten cent tax being avowedly an effort to tax the supposed fraud or coloring in oleomargarine strips it of every element of a revenue measure. It is not, as the Senator concedes, a tax on the product, but it is an attempt to tax that which is not property, namely, a fraud.

The act of May 9, 1902, is in terms, as well as by indirection, in the attempted use of the Federal taxing power, a deliberate invasion of the police powers reserved to the states when the Constitution was adopted and never surrendered by them. This is so by the adopted rule of construction and by every reasonable intendment to be derived from the use of language employed in the framing of the statute.

There is upon the face of the act itself a discrimination, unwarranted and arbitrary, in the imposition of a tax of one-fourth of one cent per pound on oleomargarine when the product is white, and a tax of forty times that amount, or ten cents per pound, on the same product, when it is of any shade of yellow that causes it to look like butter.

It is an attempt by Congress, beyond its powers, to establish a police regulation in the manufacture, production and sale of the food product known as oleomargarine.

That the Federal and State power and authority is always to be kept inviolate, is manifested by the positive declarations

of the Supreme Court of the United States in a number of its decisions, notable in the opinion rendered by Chief Justice Fuller, in the case of the United States vs. E. C. Knight Co., 156 U. S., 1-12, in which we find the language of the Chief Justice to be as follows:

"It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne than the risk be run, in an effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality."

The canon of Chief Justice Marshall, so often referred to we adopt as the keynote of this discussion:

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are clearly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."

McCulloch vs. Maryland, 4 Wheat., 421.

The Congress of the United States is restricted and limited by the Constitution in the exercise of powers. It can exercise such powers only as are in terms or by necessary implication delegated to it. It can exercise such delegated powers only for the purposes designed by the Constitution in the terms of delegation.

The framers of the Constitution sought to and did avoid ambiguities and all uncertainties. No disguise was offered. No opportunity for an abuse or power by indirection was presented.

Nothing could have been farther from the great minds which framed the instrument than the employment of the delegated power of taxation for purposes other than those named. Nor can we impute to them an omission in the use or combination of language, which, in after years, can be availed of, to ruin and destroy one legitimate industry and impoverish those engaged in it, to thereby profit and enrich another.

If such be so, then the letter and spirit of the Constitution have been misunderstood and misinterpreted for more than a hundred years.

IV.

POLICE POWER RESERVED TO STATES.

In the course of the opinion delivered by Mr. Justice Harlan in the case of Patterson vs. Kentucky, 97 U. S., page 503, and quoting from Cooley's Constitutional Limitations, the Court says:

"In the American constitutional system," says Mr. Cooley, "the power to establish the ordinary regulations of police has been left with the individual States, and can not be assumed by the National Government."

Continuing, Justice Harlan says:

"While it is confessedly difficult to mark the precise limitations of that power, or to indicate, by any general rule, the exact limitations which the States must observe in its exercise, the existence of such a power in the States has been uniformly recognized by this Court."

Citing:

Gibbons vs. Ogden, 9 Wheat., 1;
The License Case, 5 How., 104;
Gilman vs. Philadelphia, 3 Wall., 713;
Henderson vs. The Mayor of the City of New York, 92 U. S., 259;
Railroad Company vs. Husen, 95 U. S., 465;
Beer Company vs. Mass., 97 U. S., 25.

"It is embraced in what Chief Justice Marshall, in Gibbons vs. Ogden, called that 'immense mass of legislation' which can be most advantageously exercised by the States, and over which the national authorities cannot assume supervision or control."

It cannot be denied that the power of a state to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, "the power to govern men and things within the limits of its dominion," is a power originally and always belonging to the States, no surrendering of them to the general government, nor direct restraint by the Constitution of the United States, and essentially exclusive.

V.

THE TAXING POWER OF CONGRESS.

U. S. Const. Art 1, Sec. 8, Par. 1. "The Congress shall have power to lay and collect taxes, duties, imposts, excises, to pay the debts, and provide for the common defense and general welfare, of the United States; but all duties, imposts, and excises, shall be uniform throughout the United States:"

Par. 18, of same section: "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."

This delegates power to Congress, and it has no other. "All legislative powers herein granted shall be vested in a Congress

of the United States," etc. (Art. 1, Sec. 1.) To execute this power the laws passed must be necessary and proper for the purpose. (Art. 1, Sec. 8, Par. 18.) The Tenth Amendment of the Constitution confirms all this. This amendment provides: "The powers not delegated to Congress by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people."

It is a revenue power vested in Congress as a substitute for the Eighth Article of the Confederation, giving to the Federal Government an express power to raise its own revenue independent of State action; as it had been dependent on State will under the Confederation. The language imports a revenue power to lay and collect. These words are wedded and are not to be divorced. Taxes are not to be laid except to be collected; revenue is the object of the grant and none other. Hence no other should be employed.

The tax upon oleomargarine provided for in this act of May 9, 1902, is distinctly within the definition of the term excise.

> Pacific Insurance Co. vs. Soule, 7 Wall., 433-440;
> Veazie Bank vs. Fenno, 8 Wall., 433;
> Scholey vs. Rew, 23 Wall., 331;
> Springer vs. United States, 102 U. S., 585.

A question which for many years excited great contention was whether the words of the clause of the Constitution "to pay the debts, and provide for the common defense and general welfare of the United States" was a grant of a distinct power or whether they declare only the object of the tax power preceding.

That the latter is the proper interpretation to be given to the words of this clause of the Constitution, is fortified by an almost unanimous weight of authority.

Judge Story, on the Constitution, says: "That this interpretation is supported by reasoning at once solid and impregnable; that it is, as if it read, 'The Congress shall have power to lay and collect taxes, etc., in order to pay the debts and to provide for the common defense and general welfare of the United States; that is, for the purpose of paying the public debts and providing for the common defense and general welfare of the United States.'" And he quotes the argument of Mr. Jefferson in favor of this construction, with strong approbation.

Storey on the Constitution, sections 907, 908, 926.

We ask the question, is it legitimate to give to the power of taxation, which is ordinarily but a means for effecting the purposes of power, the larger function of unlimited discretion in selecting objects not within the delegated power? Is it legitimate thus indirectly to carry into effect an ungranted power—a power which, being ungranted and if not prohibited to the states, is reserved to them? Is not this a usurpation by indirection, through taxation, as flagrant as if it were a bald exercise of an ungranted power?

In the very early case of Gibbons vs. Ogden, 9th Wheaton, 1-199, Chief Justice Marshall says: "Congress is not empowered to tax for those purposes which are within the exclusive province of the States." And the Chief Justice argues that though the State and the United States tax the same subject, they exercise diverse powers, because each taxes for the objects confided to it, and neither can tax for the powers confided to the other. And in that connection it was that he used the sentence just quoted. Therefore, though Congress might deem that the exercise of a state power was in a certain sense for the common defense and general welfare, it could not exercise it, because the purpose was in the exclusive province of the States,

and reserved to them, because not delegated to the United States.

We are not unmindful of the rule that this limitation of the purpose for which taxes may be levied by Congress, while historically interesting, is really addressed to the legislative discretion rather than to the judicial power, for the reason that the specific purposes for which the proceeds of taxes are to be expended are not declared in the acts of Congress levying them, and the courts can not therefore look beyond the acts themselves to discover those purposes; implying necessarily that if the acts themselves upon their face (Trademark cases, 100 U. S., 82-96) or by observing the declared rule of construction (Minnesota vs. Barber, 136 U. S., 313) are to be held and determined by their natural and reasonable effect and operation and the courts are not to be controlled by the declared object in the title of the act, then we contend that this act read in the light of these rules, must manifestly expose a purpose to destroy one business operating in a wholesome food product (Schollenberger vs. Pennsylvania, 171 U. S., 1) to benefit another, to wit: the butter industry.

In the case of Fairbank vs. United States, 181 U. S., 312, the court said: "The objects and modes of taxation have become a matter of special scrutiny."

The second and third paragraphs of the syllabus of this case expresses more clearly and exactly our contention made on this argument.

They are as follows:

"An act of Congress is to be accepted as constitutional, unless on examination it clearly appears to be in conflict with provisions of the Federal Constitution."

"If the Constitution in its grant of powers is to be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power of Congress, that prohibition or limitation should be enforced in its spirit and to its entirety."

In this case the court held unconstitutional a Federal tax which had been exercised without question at different periods for over 100 years.

This Court has also said in the case of Nichols vs. Ames, 173 U. S., 515, "The power to tax is the one great power upon which the whole national fabric is based. It is not only the power to destroy, but it is also the power to keep alive."

In the case of McCullouch vs. Maryland, 4 Wheaton, 316, a decision of the Supreme Court rendered in the year 1819, by Chief Justice Marshall, and a case that is notable as others of his opinions are, in that it cites no authority, for there were none to cite, but a case in which such men as Webster, Pinckney and Attorney-General Wirt appeared as counsel, the Court held

"That the state within which the branch of the United States bank was located, could not, without violating the Constitution, tax that branch."

"That the power of taxation is retained by the States; that it is to be concurrently exercised by the two governments are truths which have never been denied. But such is the paramount character of the Constitution that its capacity to withdraw any subject from the action of even this power, is admitted."

And it was in the opinion in this case that the expression, "The power to tax involves the power to destroy" first found lodgment in the decisions of the Supreme Court, but in the following language: "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all

inconsistencies are to be reconciled by the magic of the word confidence. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which would banish that confidence which is essential to all governments."

The court was unanimous, in the opinion in the case just cited, that the law passed by the legislature of Maryland imposing a tax on the bank of the United States was unconstitutional and void.

In the case of Osborn vs. United States, 9th Wheaton, 738, decided by the Supreme Court in 1824, the tax was one levied by the State of Ohio, taxing the banks of the United States Fifty Dollars on each office of discount and deposit in the state. And the Court said "To tax its facilities was to tax the bank itself."

Again in the great case of Brown vs. Maryland, 12th Wheaton, 419, decided in 1827, and being another decision of the great Chief Justice, it was said in his opinion rendered in that case, "It has been observed that the powers remaining with the States may be so exercised as to come in conflict with those vested in Congress. When this happens, that which is not supreme must yield to that which is supreme."

It is to be observed that in the cases just cited there was concurrent power of taxation in the general government and in the States, but that the Constitution, being supreme, state authority must end when found in conflict with the true exercise by Congress of a power delegated to it by the Constitution.

In the case at bar there is no such concurrent exercise of power or conflict of authority claimed, but it is insisted that Congress has attempted by the provisions of the act of May 9, 1902, to invade and usurp under the guise of a revenue measure the police power of the states which is by the Constitution itself specially reserved to the States themselves.

In the case of the Veazy Bank vs. Fenno, 8th Wall., 533, in an opinion by Chief Justice Chase for the court, there was again an illustration of the conflict between National and State authority in the exercise of concurrent power.

It is not to be denied that in the Veazy Bank case the power of taxation was involved with no purpose of revenue in view, but solely to destroy the interest or business upon which the tax was levied by taxing it out of existence.

In the course of its opinion the Court held "That it was a duty or excise tax and not direct; that franchises granted by the State are subject to taxation like other property, and even if the tax was excessive and indicative of a purpose to destroy the franchise, that was a question for Congress and not for the court. But apart from this, Congress having undertaken to provide a currency for the whole country, it could constitutionally secure the benefit of it to the people by appropriate legislation. It could therefore by suitable enactments restrain the circulation as money, of any notes, not issued under its own authority."

It must be manifest to the Court that the latter consideration, in the quotation just given, was the controlling one.

The paramount question presented upon this argument is: *Is it constitutional to use this taxing power for the purpose of suppressing one business because it rivals another and when, too, it is done, not as a means of revenue,—though some revenue may be derived from it—but as a bald police regulation?*

The question would seem clear that a power granted as a means of raising revenue can not lawfully be diverted from its legitimate purpose, by the indirect use of it, to do what Congress has no power to do by direction. The end is not legitimate (McCulloch vs. Maryland, 4th Wheaton, 316.)

It is true, that where the law merely imposes the tax, without disclosing the indirect purpose of its imposition, the

courts might hesitate to declare the law unconstitutional, though we insist that by equal authority, if the purpose be disclosed on the face of the act the courts should not hesitate to do so.

Cooley on the Constitution, pp. 57-60.
Loan Association vs. Topeka, 20 Wall., 655.
Powell vs. Pennsylvania, 127 U. S., 678.

In the case of Gibbons vs. Ogden, Chief Justice Marshall says: "Congress is not empowered to tax for any purposes which are within the exclusive province of the States."

It would seem to follow as a natural and reasonable argument that Congress is not empowered to tax so as to suppress that which is within the exclusive province of the States. If fraud exists, the remedy is with the States themselves. If, upon the face of this act, it is manifest, that the taxing power of the United States is sought to accomplish that which is clearly within the police power of the States to regulate by appropriate State legislation, and is without the power of Congress to so regulate, it becomes at once under every rule of construction, interpretation and intendment an invalid and unconstitutional law.

VI.

DUE PROCESS OF LAW AND THE PUBLIC PURPOSES OF TAXATION.

United States Constitution, 5th Amendment.
United States Constitution, 14th Amendment.

The Act of May 9th, 1902, by its operation manifestly works an appropriation of private property without due process of law, and is therefore against both the letter and spirit of the Constitution of the United States.

In Fletcher vs. Peck, 6 Cr., 135, Chief Justice Marshall said:

"It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative. And if any be prescribed, where are they to be found, if the property of an individual fairly and honestly acquired may be seized without compensation."

Chief Justice Chase in the Legal Tender Cases, 12 Wall., 581, declared:

"And if the property of an individual cannot be transferred to the public, how much less to another individual."

In accord with these declarations, the late Mr. Justice Miller, in Loan Association vs. Topeka, 20 Wall., 655, speaks with great force upon this subject in the celebrated opinion rendered by him in that case.

"The theory of our governments, state and nation, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers. There are limitations on such powers which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name." * * *

"Of all the powers conferred upon governments, that of taxation is the most liable of abuse. * * *

"The power to tax is therefore the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people. It was said by Chief Justice Marshall, in the case of McCulloch vs. The State of Maryland, 4 Wheat., 431, that the power to tax is the power to destroy. * *

"This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised. * * *

"To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms."

VII.

If the court should, however, find the acts of August 2, 1886, and May 9, 1902, to be valid and constitutional acts, we still contend that the government ought not to recover in this case for the reason that oleomargarine which contains no artificial coloration except such as is imparted by the colored butter, which is one of its constituent parts, as was the case with the oleomargarine which is the subject matter of this action, is not properly subject to a tax of ten cents per pound, but only to a tax of one-fourth of one cent per pound.

We believe it is conceded by everybody that butter is a proper and well-recognized ingredient in, or component part of, the better grades of oleomargarine, and that if the butter thus used does not itself contain any additional coloring matter, the oleomargarine in which it is used is subject only to the one-fourth of one cent tax, unless it contains some other "artificial coloration." To illustrate what we mean, it is a well-known fact that butter produced during the months of May and June, when the grass is fresh and green, has a natural yellow color, being the color, which, as has been well said, is given to it by Nature. This butter when used as an ingredient in oleomargarine will, in the very nature of things, inevitably and naturally impart to the manufactured product a tinge of yellow. Now, assuming that the oleomargarine thus made has no artificial coloring matter in it, we do not believe it will be seriously

contended by anybody that it will be subject to the ten cent tax.

We admit that it would have been subject to the ten cent tax if the Act of May 9, 1902, had passed Congress as originally introduced. As introduced and as first passed by the House of Representatives, the bill provided as follows:

"Sec. 8.—That upon oleomargarine * * * there shall be assessed and collected a tax of ten cents per pound, * * * * Provided, when oleomargarine is free from coloration *or ingredient* that causes it to look like butter of any shade of yellow, said tax shall be one-fourth of one cent per pound." (Italics ours.)

If the bill had become a law in this form, clearly any oleomargarine which contained any ingredient, be it natural yellow butter, cotton-seed oil, or any other yellow vegetable oil, which imparted to the product a yellow tinge, would be subject to the ten cent tax.

The record, however, shows that the Senate deliberately and advisedly struck out the words "or ingredient" and inserted the word "artificial," so that the language now reads: "Provided, when oleomargarine is free from *artificial* coloration that causes it to look like butter of any shade of yellow said tax shall be one-fourth of one cent per pound," and this action was concurred in by the House of Representatives, and is now the law.

This amendment was offered by Senator Foraker, of Ohio, who, in advocating its adoption, said, among other things:

"The other amendment which I propose to offer is to strike out the words 'ingredient or,' found at the end of line 25 on page 2, and to strike out the same words where they occur on page 3. The language that I wish to amend is the following:

And any person that sells, vends, or furnishes oleomargarine for the use and consumption of others, except to his own family and guests thereof without compensation, who shall add to or mix with such oleomargarine any ingredient or coloration that causes it to look like butter of any shade of yellow shall also be held to be a manufacturer of oleomargarine within the meaning of said act, and subject to the provisions thereof.

"By striking out the words 'ingredient or' and inserting the word 'artificial,' as I should have stated that my amendment provides, the language would read as follows:

And any person that sells, vends, or furnishes oleomargarine for the use and consumption of others, except to his own family and guests thereof without compensation, who shall add to or mix with such oleomargarine any artificial coloration that causes it to look like butter of any shade of yellow shall also be held to be a manufacturer of oleomargarine within the meaning of said act, and subject to the provisions thereof.

"The necessity for that is in this: From the bulletin furnished us by the Director of the Census, to which I referred a moment ago, it is shown that in each of the formulas according to which oleomargarine is made there are ingredients used that must of necessity give to it some slight shade of yellow, and I may remark in this connection that in all the cases which have gone to the Supreme Court of the United States the testimony reviewed, or the testimony that was offered and rejected, has been testimony showing, according to the finding of the Supreme Court of the United States, that the natural color of oleomargarine shows some slight shade of yellow. That has been shown, I believe, in every one of the decisions. It must of necessity occur if oleomargarine be made according to these formulas. I will not take the time to read from all of them, but only from the last one:

Formula 3.—High grade.

	Pounds.
Oleo oil	100
Neutral oil	130
Butter	95
Salt	32
Color	½
Total	357½

"In other words, 95 pounds out of a total of 357 1-2 pounds of the product is butter itself.

"According to the other formulas no butter is used, but cream and milk are used in one and milk in the other, and other ingredients which of necessity would give some slight shade of yellow. That being the case, for us to provide that no ingredient shall be used that will lend any shade of yellow whatever to the color of oleomargarine would be for us to make it impossible for oleomargarine to be made according to any acceptable or known formula now in use, and certainly would make it impossible for it to be manufactured in accordance with the most acceptable formula,

that numbered 3, as given in this bulletin by the Director of the Census.

"Now, unless we intend absolutely to prohibit the manufacture of oleomargarine, we ought not so to provide in our bill as to bring about that result. I understand it is not claimed that the purpose of the bill is to prohibit. If that were the claim, many of us could not support it at all. But it is only to impose a tax on the doing of that thing which may lead to fraud, imposition, and deception. If that be true, if our purpose is to allow it to be made according to these acceptable formulas and sold according to its merit, then we ought not to prohibit the putting in of ingredients which are absolutely necessary to make an acceptable and wholesome product.

"For that reason I shall move to amend, as I have already indicated, by striking out the words 'ingredient or' and inserting the word 'artificial,' so that the only thing prohibited by the bill with respect to the matter of color will be the putting into oleomargarine of any artificial coloration. That, I think, ought to be prohibited. I think the manufacturers of the product ought to be allowed to use the other ingredients just as they are using them."

The record shows that no exception was taken to these remarks of the Senator from Ohio, and the amendment was adopted without even a division. (See Congressional Record, 57th Congress, 1st Session, p. 3840.) Under these circumstances, how can it be claimed that oleomargarine containing any ingredient which has a natural yellow color and which has thus imparted to it a tinge or shade of yellow, has in it "artificial coloration," and is therefore taxable at ten cents a pound? To assert that this would be "artificial coloration" is doing violence to words; and we leave this branch of the subject confident that our contention with respect to it is correct. Any other construction would make meaningless the amendment referred to.

Our claim, however, is that even if the butter used contains additional coloring matter, the oleomargarine in which it is

used, if free from any other "artificial coloration," is subject only to the lower tax. In other words, our contention is that under the law as it now stands, butter which contains additional coloring matter cannot be construed to be "artificial coloration that causes it to look like butter of any shade of yellow," as defined in the Act of May 9, 1902.

The grounds for our contention are, briefly stated, as follows:

In the first place, as above stated, butter has always been a proper ingredient in the manufacture of oleomargarine, adding, as it does, to the quality and flavor of the product.

This presence of butter in oleomargarine has been not only commercially recognized as a proper ingredient, but it has also been so recognized in the legislation enacted on the subject. Section 2 of the Act of August 2, 1886, defines oleomargarine as follows:

"Sec. 2.—That for the purposes of this Act certain manufactured substances, certain extracts, and certain mixtures and compounds, *including such mixtures and compounds with butter*, shall be known and designated as 'oleomargarine,' * * * (Italics ours.)

In other words, Congress has in express terms said that "for the purpose of this Act" butter is a proper ingredient in oleomargarine, and this legislative recognition has uniformly obtained since 1886.

If Congress had contented itself with this recognition of butter in oleomargarine as shown above, it might very well be urged that the only butter that could be used is butter in its pure and original state, just as it comes from the dairy, and free from any foreign substance or ingredient. This condition does not, however, obtain; for Congress has again given a definition "for the purposes of this Act."

Section 1 of the Act of August 2, 1886, provides as follows:

"That for the purpose of this Act the word 'butter' shall be understood to mean the food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, *and with or without additional coloring matter.*" (Italics ours.)

This definition of butter is repeated in the Act of May 9, 1902, Section 4 of which, among other things, provides as *follows:*

"Sec. 4.—That for the purpose of this Act 'butter' is hereby defined to mean an article of food as defined in 'An Act * * * approved August 2, 1886.'"

Congress having thus defined butter, we do not see how there is any escape from the conclusion that the "butter" which may be included in the mixtures and compounds described in Section 2 is butter "with or without additional coloring matter." This is clearly apparent when we remember that the word "butter" occurs in the operative part of the Act of August 2, 1886, only in Section 2, and that therefore the definition of butter in Section 1 has reference solely and entirely to the "butter" which may be included in such mixtures and compounds. In other words, a fair and proper interpretation of the language used in the Act would result in a definition of oleomargarine about as follows: "Certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, *with or without additional coloring matter in said butter,* shall be known and designated as oleomargarine, etc."

In discussing this question, we think it important to consider the purposes of the Act of August, 1886, as amended by the Act of May 9, 1902. The purposes of the Act are to impose special taxes upon manufacturers of and dealers in oleomargarine, and to assess a tax upon all oleomargarine which shall

be manufactured and sold or removed for consumption or use. And to carry out and execute these purposes certain well-defined regulations pertaining to the manufacture of oleomargarine and the manner of its sale are prescribed by the Act, together with penalties for the violation of any of its provisions.

It is to be noted that the only subject legislated upon by this Act is oleomargarine. Butter is in no sense whatever a subject-matter of legislation in the Act. It is mentioned in Section 1 simply to define it "for the purpose of this Act." In Section 2 it is mentioned only to designate it as one of the proper and lawful ingredients of oleomargarine.

In other words, Congress was careful not only to recognize butter as a proper ingredient, but also to expressly prescribe the kind of butter that might be so used. It thereby fixed a standard for the butter to be used. This standard consists of two kinds of butter, viz.: butter with coloring matter and butter without coloring matter. Either kind of butter complies with and is up to the standard fixed. For the purposes of the Act, either kind may be used as an ingredient in oleomargarine as properly and lawfully as the other. No exception can be taken to the use of either kind. A manufacturer may, under the Act, make two kinds of oleomargarine, one with uncolored butter as an ingredient, and another with colored butter; and the one will be just as lawful and legitimate a product as the other.

Congress having thus recognized colored butter as a legitimate ingredient, we claim that it clearly comes within the class of other proper products used in the manufacture of oleomargarine, such as oleo, neutral, lardine, suine, etc., and that it is not in any sense an additional substance used for the purpose of artificially changing or altering the character of the finished product.

To state our position illustratively: A manufacturer of oleomargarine desires to make his product in a manner that

will subject it only to the lower tax. He gathers together its constituent or component parts in the proportions in which he desires to mix them. These parts consist of oleo oil, neutral oil, butter, cotton-seed oil and salt. He does not add to or mix with these ingredients any coloring matter whatsoever. Observe that these constituents are not only all well-recognized and legitimate ingredients, but they are natural, if we may use the term, as distinguished from artificial, ingredients. We claim that oleomargarine thus made is free from "artificial coloration," even though the butter and the cotton-seed oil in it impart a yellow tinge, for they are in no sense "artificial" ingredients designed to change the appearance or character of the product. In fact, the appearance these ingredients give to the product is perfectly natural, for being proper ingredients they partake of the nature of the product. Before the oleomargarine above described can be said to contain "artificial coloration" within the meaning of Section 8, the manufacturer must deliberately add to it some ingredient in addition to the lawful and proper ingredients above mentioned, with the intent of changing the color imparted by those ingredients to a color that causes it to look like butter of any shade of yellow.

To hold otherwise, would simply resolve the whole matter into a question of color; that is, yellow oleomargarine shall be taxed ten cents per pound, and white oleomargarine one-fourth of one cent per pound. We cannot believe that anybody will claim that Congress had any such idea in view. If it had, it could have said so in a bill of ten or fifteen lines; and all the debates on the subject could have been dispensed with. What Congress did mean to do was to place a ten cent tax upon oleomargarine which was "artificially" colored, with intent to make it look like butter, and to place a tax of one-fourth of one cent per pound upon oleomargarine which contained only the component parts properly making up the product, among which is butter as defined by the Act itself.

Our position in this matter is clearly shown and emphasized by the language used in the additional definition of a manufacturer of oleomargarine as contained in Section 2 of the Act of May 9, 1902. That definition is as follows:

"And any person that sells, vends, or furnishes oleomargarine for the use and consumption of others, except to his own family table without compensation, who shall *add to or mix with* such oleomargarine any artificial coloration, * * * shall also be held to be a manufacturer of oleomargarine, etc."

Surely it cannot be said that a person who sells or vends oleomargarine that has a yellow tinge imparted to it by butter or cotton-seed oil, or any other legitimate ingredient, is a manufacturer within the meaning of this section. Certainly not; because before such construction can be given, he must "*add to or mix with* such oleomargarine any artificial coloration, etc." He may add this "artificial coloration" to oleomargarine which he has purchased in the open market and which is already slightly tinged by butter or cotton-seed oil, so as to give it a deeper yellow, or he may add it to white oleomargarine, which contains no butter or cotton-seed oil. In either event, he would come within the definition; but he would not come within it until he actually "added to or mixed with" it the "artificial" coloration.

Could anything more clearly and emphatically disclose the meaning of Congress that "artificial coloration" is something *in addition* to the proper ingredients of oleomargarine as defined in the Act? We think not; for we must not forget that Sections 1 and 2 were in force when the Act of May, 1902, was under consideration, and we must assume that Congress was aware of the definitions given in those sections of butter and oleomargarine. Congress therefore knew, when it passed the Act of May 1902, that butter, with or without additional coloring matter, is and always has been, a proper and lawful com-

ponent part of oleomargarine; and therefore when it struck out the words "ingredient or" in Section 8 and inserted the word "artificial," it clearly meant that the coloration necessary to subject the product to the ten cent tax must be imparted, not by a lawful ingredient, but by something which is placed in the product in addition to such ingredients for the purpose of causing it to look like butter of any shade of yellow.

To give any other construction to the Act than the one we contend for, the Court would have to entirely ignore, wipe out, and make ineffective Sections 1 and 2, and the amendments to the Act of May 9, 1902; which, if followed to its logical conclusion, would make the use of any kind of butter impossible. This, we submit, cannot be done. The act must be read as a whole, and each section construed with reference to every other section. If this is done we confidently believe this Court will hold that butter, as defined in the Act of August 2, 1886, is a lawful and proper component part of oleomargarine, and that the coloring matter in the butter cannot be construed to be "artificial coloration" within the meaning of Section 3, as amended by the Act of May 9, 1902.

Respectfully submitted,

MILLER OUTCALT,

CHARLES E. PRIOR,

Counsel for Plaintiff in Error.

In the Supreme Court of the United States

OCTOBER TERM, 1916.

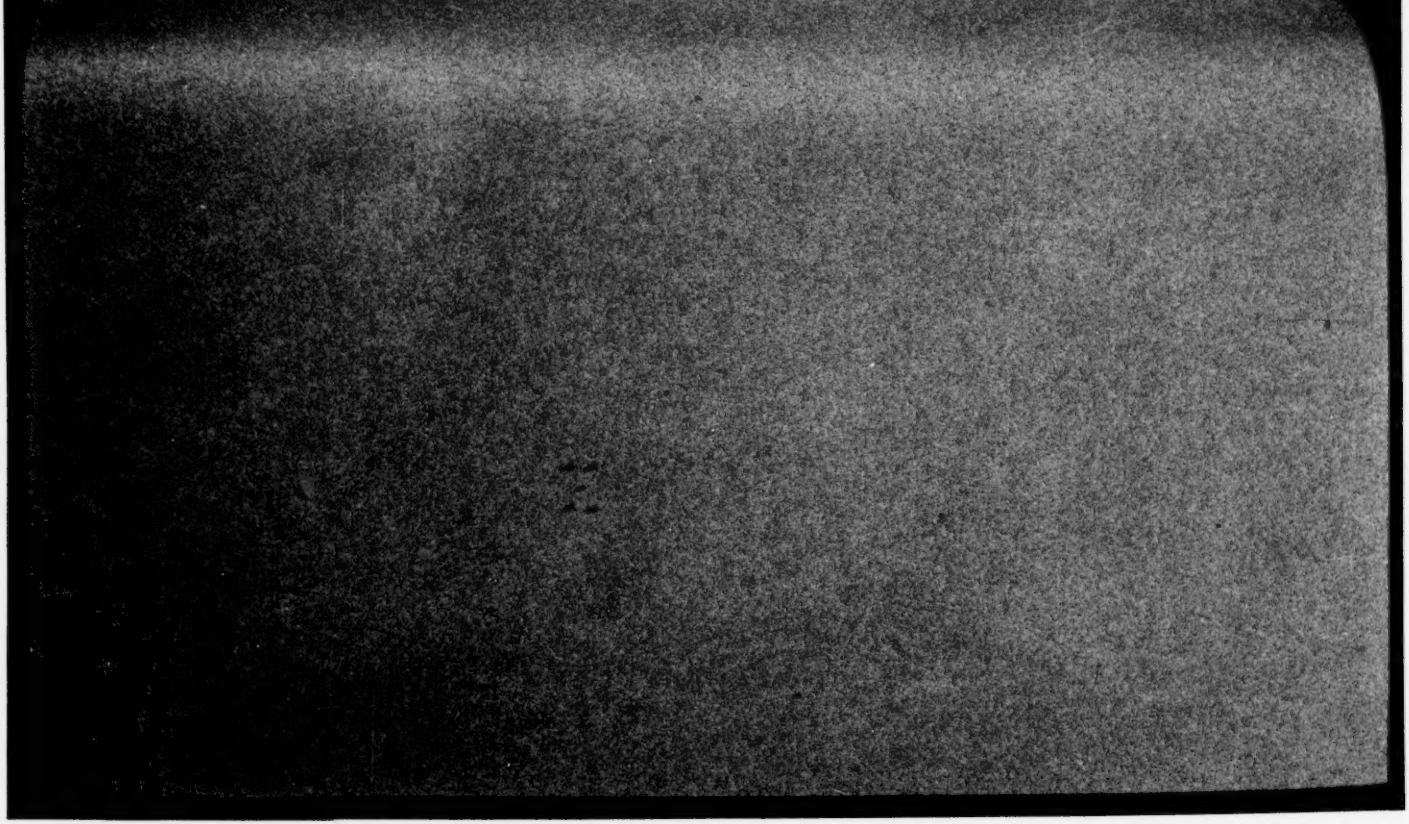
AUGUST CLEVE, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 228.

FREDERICK J. SCHLOS, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 229.

WILLIAM BROADWELL, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 229.

LEO. W. MCCRAY, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 201.

BRIEF FOR THE UNITED STATES.



SYNOPSIS OF THE BRIEF.

	Page.
Preliminary statement and charges	1–5
Assignment of errors	5–7
Provisions of law attacked, quoted	7–9
ARGUMENT.	
I. The provisions of the law attacked do not encroach upon or interfere with the powers reserved to the States	9–16
II. Limitations upon the power of Congress to impose excises	16–17
III. Congress may classify property for taxation	17
IV. Limitations imposed upon the taxing power of Congress by the Fifth Amendment	17–23
V. "Implied limitations" upon the taxing power. Separate powers of the three co-ordinate branches of the Government	23–29 29–38
VI. Section 14 does not confer upon the Commissioner of Internal Revenue judicial power	38–49
VII. Effect of the alleged void provision and amendment.	49–52
VIII. Reply to briefs for plaintiffs in error	52
(1) The act is a revenue measure, and does not attempt to regulate the manufacture of oleomargarine	53–58
(2) Further as to the propriety of the classification	58–62
(3) The tax may be sustained as a means to prevent fraud in the collection of the tax laid upon the legitimate article	62–71
(4) The tax is not prohibitive of the manufacture and sale of colored oleomargarine	71–89
(5) Further on the validity of the classification; proper substitutes, and improper imitations.	89–93
(6) The oleomargarine involved in each of these cases was artificially colored, within the meaning of section 8	93–96
(7) As to coloration by means of palm oil	96–102
(8) May plaintiffs in error attack the validity of the provision of section 14 conferring finality of decision upon the Commissioner of Internal Revenue?	102–103
(9) The trial court rightfully excluded the testimony for the defendants below	103
Appendix A. Oleomargarine law	105–116
Appendix B. Synopsis of laws of States and Territories regulating the manufacture and sale of oleomargarine.	117–138

11507—03——0



26805

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

AUGUST CLIFF, PLAINTIFF IN ERROR, *v.* THE UNITED STATES.	No. 221.
FREDERICK J. SCHICK, PLAINTIFF IN error, *v.* THE UNITED STATES.	No. 222.
WILLIAM BROADWELL, PLAINTIFF IN error, *v.* THE UNITED STATES.	No. 223.
LEO. W. MCCRAY, PLAINTIFF IN ERROR, *v.* THE UNITED STATES.	No. 301.

BRIEF FOR THE UNITED STATES.

PRELIMINARY STATEMENT.

In each of these four cases there is raised the question of the validity of sections 8 and 14 of the act of Congress of August 2, 1886 (24 Stat., 209) as amended May 9, 1902 (32 Stat., 193), imposing a tax upon the manufacture and sale of oleomargarine.

The first three cases were criminal prosecutions by information instituted in the United States district court for the northern district of Illinois. In each case a jury was waived, a trial had before the court, the defendant found guilty, and a fine imposed. A motion to find the defendant, upon the evidence, not guilty, was filed in each case, the motion being overruled and exceptions taken. So too, motions for new trials and in arrest of judgment were filed, overruled, and exceptions taken.

In the McCray case suit was brought in the district court of the United States for the southern district of Ohio, to recover a penalty of $50, as provided in section 11 of the act of August 2, 1886, for having purchased and received for sale oleomargarine that had not been stamped as required by law.

THE CHARGES.

The substance of the charge in the *Cliff* case was:

That on December 22, 1902, at Chicago, Ill., Cliff, a retail dealer in oleomargarine, did knowingly purchase and receive for sale from the manufacturer 10 pounds of oleomargarine artificially colored with palm oil; that the said oleomargarine was contained in a new wooden original manufacturer's package, to which no coupon stamp or stamps in the sum of 10 cents for each pound of oleomargarine contained had been affixed for denoting the payment of the internal-revenue tax, as required by law, all of which Cliff, at the time he so purchased the same, well knew.

In the *Schick* case the charge was the same, except that the artificial coloration was the Wells-Richardson butter color.

In the *Broadwell* case the charge was the same as in the *Schick* case.

In the *McCray* case the petition avers that on October 24, 1902, McCray was a retail dealer in oleomargarine in Cincinnati, Ohio; that on that date he knowingly purchased of the Ohio Butterine Company, a corporation engaged in the manufacture of oleomargarine at Cincinnati, 20 pounds of oleomargarine which contained artificial coloring matter; that the stamps affixed to the package in which the oleomargarine was contained were of the value and at the rate of one-fourth of a cent for each pound contained in the package; all of which the defendant at the time well knew.

In his answer the defendant admits that at the time stated he was a retail dealer in oleomargarine; that he purchased the oleomargarine as alleged; that the revenue stamps upon the package were of the value of but one-fourth of a cent for each pound contained therein; that he had full knowledge respecting the ingredients used in its manufacture, the formula being given. He admits that the oleomargarine was of a yellow color; but he says that color was imparted to it by the use of the creamery butter, which had been colored yellow by the use of the "Wells-Richardson's Improved Butter Color," and that it contained no other coloring matter.

He denies that the oleomargarine was artificially colored within the meaning of section 8 of the act of August 2, 1886, as amended May 9, 1902.

In his second defense he alleges the act in question to be unconstitutional and void, which is the general defense in all the cases.

To this answer the Government interposed a demurrer, which, upon hearing, was sustained, and judgment was rendered against the defendant in the sum of $50 as penalty, and for costs. To this action the defendant duly excepted and sued out a writ of error to this court.

To summarize:

In the *Cliff* case the oleomargarine had been colored by the use of palm oil, and a tax of one-fourth cent per pound had been paid thereon;

In the *Shick* case the oleomargarine had been colored by the use of the "Wells-Richardson's Improved Butter Color," and a tax of 2 cents per pound had been paid thereon;

In the *Broadwell* case the oleomargarine had been colored by the use of the "Wells-Richardson's Improved Butter Color," and no tax whatever had been paid thereon; and

In the *McCray* case the oleomargarine had been colored by the use of creamery butter, which butter had been artificially colored by the use of the "Wells-Richardson's Improved Butter Color," and a tax of one-fourth cent per pound had been paid thereon.

ASSIGNMENT OF ERRORS.

As the errors assigned in the *Cliff* case embrace all those assigned in the other cases (with one exception), it will be sufficient to state the errors in that case, with the additional assignment in the McCray case.

In the *Cliff* case the errors alleged are:

I.

In refusing to hold that the provisions of the act of Congress relating to oleomargarine and butter of August 2, 1886, as amended by the act of Congress of May 9, 1902, under which the defendant was convicted, are in contravention of the Constitution of the United States and the amendments thereto, because—

(1) The said provisions deprive the defendant and the oleomargarine manufacturers and dealers in the United States of their liberty and property without due process of law.

(2) The said provisions constitute an unwarranted encroachment upon and interference with the police powers reserved to the several States and to the people of the United States.

(3) The said provisions invest an inferior executive officer with the power finally and arbitrarily to determine essentially judicial questions concerning vast property rights.

(4) The said provisions so arbitrarily discriminate against the oleomargarine industry in favor of the butter industry in the United States as to

be repugnant to the fundamental principles of equality and justice inherent in the Constitution of the United States.

II.

In striking out and refusing to consider proper evidence offered and received on behalf of defendant, showing—

(1) That the natural color of butter varies at different seasons of the year, from almost pure white in the winter season to a high shade of yellow in the spring season, if made from the milk of grass or clover fed cows; and that all butter during all seasons of the year, including that made from the milk of grass or clover fed cows, is uniformly colored a shade of yellow somewhat deeper than the natural color of June butter before it is put on the market.

(2) That there is no demand in the market for butter having only its natural color, except June butter, and that there is no demand in the market for oleomargarine for table use unless the same is colored a shade of yellow which causes it to look like yellow butter.

(3) That oleomargarine is a substitute for and competes with butter, and that the market demand for both butter and olemargarine requires that they shall have a uniform color of a shade of yellow during all seasons of the year.

(4) That the cost of production of oleomargarine is such that after payment of a tax of 10 cents

per pound thereon when colored, as required by the act of Congress relating to butter and oleomargarine of August 2, 1886, as amended by the act of Congress of May 9, 1902, the same can not be sold in competition with butter.

(5) That the operation and effect of said act of Congress as amended, relating to butter and oleomargarine, are to prevent the people of the United States from obtaining oleomargarine in the condition in which they want it, and to destroy the oleomargarine industry in the United States, and unjustly to discriminate against the same in favor of the butter industry. (R., p. 26.)

The additional assignment of error in the *McCray* case is the following (R., p. 8):

(III) If said act be not in contravention of the Constitution of the United States of America, then said court erred in holding that oleomargarine which contains no other artificial coloration than that imparted to it by the use of butter which itself contains coloring matter and which therefore causes said oleomargarine to look like butter of a shade of yellow, is subject to a tax of 10 cents per pound instead of a tax of one-fourth of 1 cent per pound.

ARGUMENT.

There is involved in these cases the validity of sections 8 and 14 of the oleomargarine law. The pertinent portions of these sections are as follows:

> SEC. 8. That upon oleomargarine which shall be manufactured and sold, or removed

> for consumption or use, there shall be assessed and collected a tax of ten cents per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a packet shall be taxed as a pound: *Provided*, When oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow said tax shall be one-fourth of one cent per pound. (Act of May 9, 1902; 32 Stat., 194.)
>
> SEC. 14. And such Commissioner is authorized to decide what substances, extracts, mixtures, or compounds which may be submitted for his inspection in contested cases are to be taxed under this act; and his decision in matters of taxation under this act shall be final.

The law is given in full as Appendix "A" to this brief.

The plaintiffs in error contend that these provisions violate the Constitution and the amendments thereto, in that—

(1) They encroach upon and interfere with the powers reserved to the several States;

(2) They deprive the plaintiffs in error of liberty and property without due process of law;

(3) They invest an administrative officer with the power finally to determine essentially judicial questions.

I.

THE PROVISIONS ATTACKED DO NOT ENCROACH UPON OR INTERFERE WITH THE POWERS RESERVED TO THE SEVERAL STATES.

In entering upon a discussion of this question it becomes necessary at the outset to ascertain the character of the tax imposed and of the law in question. That the tax is an excise can not be doubted (*Patton* v. *Brady*, 184 U. S., 619); and that the act is to be deemed a revenue measure has been declared by this court (*In re Kollock*, 165 U. S., 536). In the latter case the validity of those provisions of section 14 of the act under consideration which empower the Commissioner of Internal Revenue to designate the character of the brands which shall be placed upon oleomargarine before its sale, was assailed as being an attempted delegation to that officer of judicial power. In reaching the conclusion that those provisions were not open to objection, the court discusses the character of the act, the Chief Justice, speaking for the court, saying (p. 536):

> The act before us is on its face an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue.

After referring to the authority conferred upon the Secretary and the Commissioner of Internal Revenue by section 3446 of the Revised Statutes, to

change the character of the mark or label used on tobacco or distilled spirits, and to make and publish regulations respecting their use, the court continues (p. 537):

> The oleomargarine legislation does not differ in character from this, and the object is the same in both, namely, to secure revenue by internal taxation and to prevent fraud in the collection of such revenue. Protection to purchasers in respect of getting the real and not a spurious article can not be held to be the primary object in either instance, and the identification of dealer, substance, quantity, etc., by marking and branding must be regarded as means to effectuate the objects of the act in respect of revenue.

The amendment to section 8 made by the act of May 9, 1902, does not change the character of the law. It must still be regarded as a revenue measure.

The tax being an excise and the act a revenue measure, in what way does the imposition of this tax interfere with or encroach upon the *power* of the *States* to regulate the manufacture of oleomargarine? The opposing argument amounts to this: That by the imposition of the tax the Government diminishes profits, compels the product to be branded so as to render it more difficult to sell it as a substitute for butter, and by so doing diminishes the demand and output. That therefore by diminishing the demand for the article in the

colored form the Federal authority illegally regulates and restricts its production, which is wholly a matter for State control.

But this is clearly a mistaken conception of the situation. This tax is a *burden* imposed by Congress. The result of any tax is necessarily more or less onerous. It is not regulation within the constitutional meaning of the term as obnoxious now to National and again to State authority. Congress does not go outside of its domain to "regulate," and regulates (so to speak) or controls the business only so far as is legitimate to discover the selected objects of taxation and to assess and collect the tax thereon. Congress lays down certain rules, mainly to assure publicity and verity as to the real character of the article, so that taxables may be surely reached, so that the law may not be readily evaded. All this is incident to the *burden* of the tax; it is not unconstitutional regulation. It may be true that business has been affected, temporarily or even permanently—so far as markets may have been disturbed and conse quent readjustments made necessary—this again is an incident, a ~~national~~ incident and legitimate result of the *burden* of the tax.

The system under which spirituous and malt liquors and tobacco are taxed offer a precise counterpart. Is it not within the power of Congress to decide that the article oleomargarine shall be assimilated to these other articles in the method and manner of taxation?

No reason can be perceived why Congress may determine for itself the reasons and justifications for an onerous internal-revenue tax on strong drink and tobacco, and may *not* determine for itself the reasons for the taxation herein involved. If public morals and the general welfare are affected in both cases, it is for Congress to weigh and settle these considerations, however they may differ in degree or kind as applied to either case, and thereupon to assimilate the oleomargarine scheme to the scheme of taxing spirituous and malt liquors and tobacco. The analogy of the method, at least, if not of the essential elements, was evidently in the mind of Congress, because some of the laws affecting tobacco were *eo nomine* [in sec. 3] applied to oleomargarine. (Secs. 3232–3241, 3243, Rev. Stat.)

Congress, thus, for the purpose of assuring the collection of the tax, has imposed certain terms or conditions upon the manufacture of the article. In reality Congress prescribes no conditions in the nature of internal regulation, as to when, where, how, out of what ingredients, or by whom oleomargarine shall be manufactured. The fact is that Congress does not act upon the article until after it is manufactured and ready to enter into commerce. It takes the article as it finds it and says that upon the uncolored article a certain tax shall be paid and upon the colored a different tax. It interferes with no regulation by the States, but leaves them free to say whether within their limits

it may or may not be manufactured, and if so, in what manner and upon what conditions. This is not a regulation of or an interference with the power possessed by a State.

In *Nicol* v. *Ames* (173 U. S., 509) there was involved the validity of that provision of the war-revenue act of 1898 which imposed a tax upon all sales made at any exchange or board of trade. The act required that in making such sales a written memorandum thereof should be made, upon which the stamp, denoting the tax, should be placed. It was contended that this was an attempt on the part of Congress to regulate the making of contracts, and therefore an invasion of the powers of the States. But the court, speaking by Mr. Justice Peckham, held otherwise, saying (p. 523):

> The act does not assume to in any manner interfere with the laws of the State in relation to the contract of sale. The memorandum required does not contain all the essentials of a contract to sell. It need not be signed, and it need not contain the name of the vendee or the terms of payment. The statute does not render a sale void without the memorandum or stamp which by the laws of the State would otherwise be valid. *It does not assume to enact anything in opposition* to the law of any State upon the subject of sales.
>
> * * * * *
>
> The means actually adopted do not illegally interfere with or obstruct the internal

> commerce of the States, nor are such means a restraint upon that commerce so far as to render the means adopted illegal.

This language completely answers the similar contention made here.

In *Knowlton* v. *Moore* (178 U. S., 41) we find the same objection being made against the Federal inheritance tax then under discussion. It was insisted that in imposing a tax on legacies or successions, Congress was interfering with the power of the States to regulate the transmission or receipt of property by death. The court, speaking by Mr. Justice White, answers this argument in the following language (p. 59):

> But the fallacy which underlies the proposition contended for is the assumption that the tax on the transmission or receipt of property occasioned by death is imposed on the exclusive power of the State to regulate the devolution of property upon death. The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt, and not the right existing to regulate. In legal effect, then, the proposition upon which the argument rests is that wherever a right is subject to exclusive regulation, by either the Government of the United States on the one hand or the several States on the other, the exercise of such rights as regulated can alone be taxed by the Government having the mission to regulate. But when it is accurately stated, the proposition denies

> the authority of the States to tax objects which are confessedly within the reach of their taxing power, and also excludes the National Government from almost every subject of direct and many acknowledged objects of indirect taxation. * * * It can not be doubted that the argument when reduced to its essence demonstrates its own unsoundness, since it leads to the necessary conclusion that both the National and State governments are divested of those powers of taxation which from the foundation of the Government admittedly have belonged to them.

Again (p. 60):

> Under our constitutional system both the National and the State governments, moving in their respective orbits, have a common authority to tax many and diverse objects, but this does not cause the exercise of its lawful attributes by one to be a curtailment of the powers of government of the other, for if it did there would practically be an end of the dual system of government which the Constitution established.

These cases seem conclusive upon the point that in imposing the tax in question Congress has not encroached upon or in any manner interfered with the power of the States to regulate the manufacture and sale of oleomargarine.

II.

THE LIMITATIONS UPON THE POWER OF CONGRESS TO IMPOSE EXCISES.

The tax, then, is clearly an excise and the law a revenue measure. This being true, what limitations are there to be found in the Constitution upon the taxing power of Congress? The power to lay the tax in question is conferred by Article I, section 8, clause 1 of the Constitution, which declares that—

> The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.

The only limitation upon the power of Congress to impose excise taxes is the condition that they shall be uniform throughout the United States. What is the meaning of the word "uniform" as used in this clause of the Constitution?

In the *Head Money Cases* (112 U. S., 594), the court, speaking by Mr. Justice Miller, says that a "tax is uniform when it operates with the same force and effect in every place where the subject of it is found." And in *Knowlton* v. *Moore* (178 U. S., 166), the court, speaking by Mr. Justice White, says that "by the result then of an analysis of the history of the adoption of the Constitution

it becomes plain that the words 'uniform throughout the United States' do not signify an intrinsic but simply a geographic uniformity."

The tax, then, imposed by this law, is not open to the objection that it is not uniform in its operation.

III.

CONGRESS MAY CLASSIFY PROPERTY FOR PURPOSES OF TAXATION.

The proposition that Congress, in imposing taxes, may classify property for taxation is too well settled to need discussion. I refer the court to the case of *Magoun* v. *Illinois Trust and Savings Bank* (170 U. S., 283); to *Nicol* v. *Ames* (173 U. S., 509), and to the cases therein cited.

IV.

THE LIMITATIONS IMPOSED UPON THE TAXING POWER OF CONGRESS BY THE FIFTH AMENDMENT.

As shown in proposition II, the only restriction upon the power of Congress contained in that clause of the Constitution which confers the power to levy the tax, is that the excise when imposed shall be uniform throughout the United States. The tax laid here is in harmony with that restriction.

But it is insisted that the law violates those provisions of the fifth amendment, which declare that—

(*a*) No person shall be deprived of liberty or property without due process of law;

(*b*) Nor shall private property be taken for public use without just compensation.

As to the latter clause, it is sufficient to say that it refers only to a direct appropriation of property for public purposes, and not to a so-called "taking" as the effect of taxation, nor under the prohibitive result of State police laws. (*Legal Tender Cases*, 12 Wall., 551; *Transportation Co.* v. *Chicago*, 99 U. S., 642; *Mugler* v. *Kansas*, 123 U. S., 668.)

Loan Association v. *Topeka* (20 Wall., 655), cited by opposing counsel, does not affect this case. That was a suit to recover upon a bond issued in aid of a private enterprise, while the taxes imposed upon oleomargarine are paid into the Treasury of the United States and devoted to public uses. The limitation of the right of taxation recognized in that case was along "the line which distinguished the public use for which taxes may be assessed from the private use for which they may not."

As to the first clause of the Fifth Amendment referred to: Does this tax, when imposed upon colored oleomargarine, deprive the manufacturer or the dealer of his liberty or of his property without due process of law? No complaint seems to be made against the imposition of the tax of one-quarter cent per pound upon uncolored oleomargarine; the complaint is directed wholly against the imposition of the tax of 10 cents per pound

upon the artificially colored article. It is conceded, if this be a "legitimate" tax law, it is constitutional (Mr. Guthrie's brief, p. 34); but it is claimed that the exercise of the taxing power is a mere pretext "for the accomplishment of objects not entrusted to the Government;" that under the guise of taxing the attempt is made to regulate the manufacture of the article, which is beyond the power of Congress, that power being vested wholly in the States.

The original act (act of August 2, 1886, 24 Stat., 209) was entitled "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine," and imposed, in addition to certain license taxes, an excise of 2 cents upon each pound of oleomargarine manufactured and sold. The validity of the tax imposed by that act seems never to have been questioned; indeed, it was so clearly within the power of Congress that no one could reasonably hope to have it declared invalid. Certain features of it, however (the authority vested in the Commissioner of Internal Revenue to designate the manner in which oleomargarine should be branded), were assailed in *In re Kollock* (165 U. S., 526), but were sustained, with certain comments on the nature of the law, *ut supra*.

The act of May 9, 1902 (32 Stat., 193), after making some minor changes in the act of 1886 in section 3, amends section 8 of the original law by imposing a tax of one-fourth cent per pound upon

uncolored oleomargarine and a tax of 10 cents per pound upon oleomargarine when found to contain artificial coloring that causes it to look like butter. As shown by its title, this act provides for four things: (1) It makes oleomargarine and *other imitation* dairy products subject to the laws of the States and Territories into which they are transported; (2) changes the tax on oleomargarine; (3) imposes a tax upon and provides for the inspection, etc., of certain other imitation dairy products, viz, adulterated, process, or renovated butter, and (4) amends the act of 1886.

It will be observed by an inspection of the act that it provides for the taxation and regulation of "adulterated" and "process" or "renovated" butter, the tax upon the former being fixed at 10 cents per pound and upon the latter at one-fourth cent per pound. Special license taxes are imposed upon the manufacturers and the dealers therein. The oleomargarine regulations are made to apply to the butter taxed. Colored oleomargarine and adulterated butter are placed in the same category and taxed at 10 cents per pound, while process or renovated butter and uncolored oleomargarine are placed in a different class and taxed one-fourth cent per pound.

Taking, then, the act of 1886 and inserting in their proper places the amendments made by the act of 1902, we have a law which does nothing more than to impose specific taxes upon certain-named articles—colored and uncolored oleomarga-

rine, *inter alia*—the money received therefrom to be paid into the Treasury of the United States. Nothing else appears in the act, save the provisions providing for the collection of the tax and for the prevention of frauds upon the revenue. As held in *In re Kollock* (*supra*), the act primarily is a revenue act.

AS TO NOTICE, HEARING, AND RIGHT OF APPEAL.

In considering this phase of the question, viz, whether due process of law is provided, the distinction between an excise and a property tax must be kept in mind. What might not constitute due process in case of a property tax may clearly be so in the case of an excise. Generally, in case of a property tax, there is a valuation of the property by an assessing officer. The amount of the tax will depend, of course, upon the value placed upon the property by that officer. In such case, due process would require notice and an opportunity to be heard, at some time, in the matter of the tax.

But the tax here involved is an excise, a specific tax upon each pound of oleomargarine; the amount is fixed by law. The collection of the tax is devolved upon certain named officers—the Commissioner of Internal Revenue and his subordinate officers. These officers have fixed seats of office, open at all times, with opportunity to be heard. In case there is a disagreement between a collector and a manufacturer as to whether any article is

subject to the tax, or as to the rate of the tax, the article is to be submitted for the inspection of the Commissioner of Internal Revenue, whose decision is made final. (Section 14 of the act.) An appeal is therefore provided from the decision of the assessing officer to the Commissioner. In the case of a substance in oleomargarine alleged to be deleterious to health (section 14 of the original act of 1886) there is a further appeal from the decision of the Commissioner to a board composed of the Surgeon-General of the Army, the Surgeon-General of the Navy, and the Secretary of Agriculture, whose decision upon such matter is made final. There is a similar provision as to process butter under section 5 of the act of 1902.

Here, then, due notice is given by the law itself as to the liability to the tax; an appeal is provided from the decision of the collector to the Commissioner in case of a dispute respecting the taxability of the article; and a further appeal is allowed from the decision of the Commissioner where the article is claimed to be deleterious to health. So here is due notice, an opportunity for hearing, and for an appeal—in short, due process. The court has in a recent case broadly sustained executive proceedings as due process. (*The Japanese Immigrant case*, 189 U. S., 86.)

V.

"IMPLIED LIMITATIONS" UPON THE TAXING POWER.

Plaintiffs in error must concede that Congress has the power to impose an excise upon oleomargarine, and they offer to pay what they call a "fair tax." But they say this tax is excessive and confiscatory; therefore (in effect) they say that it loses its character as an excise and becomes something else—a prohibition upon the oleomargarine industry. And, while there is no express limitation in the Constitution upon the power of Congress to levy this variety of tax, other than that it shall be uniform, upon some notion of an implied limitation on Congress, inherent in that instrument, or upon some implied power in this court to revise the legislative action in laying a tax, although this court has disclaimed any such power, they ask the court to declare this tax invalid.

What has the court said with respect to the power of Congress to tax?

Beginning with *McCulloch* v. *Maryland* (4 Wheat., 316), we find Chief Justice Marshall saying (p. 431) that "the power to tax is the power to destroy." Counsel for the plaintiffs in error answer this by saying that it only shows "the dangers which lurk in a brilliant epigram."

Chief Justice Marshall said no idle word in his opinions. He did not utter brilliant epigrams. The characteristic mark of his judgments and of the reasoning and logic by which he enforced them

is that, tested by time and events, he thought out to the furthest reach of the human intellect the meaning of his language and traced its remotest bearings and effect. When he laid down his famous propositions, like this one, he was conscious of their fullest import and deliberately intended what they obviously meant. No one standing before this bar can doubt or challenge this fact, however sincerely he may think that no human intellect, even one of the greatest, is infallible.

Chief Justice Marshall then continues (p. 431):

> Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government.

Nothing is said about an implied limitation upon this power.

In *Gibbons* v. *Ogden* (9 Wheat., 1) we find Chief Justice Marshall, in defining the extent of the power of Congress to regulate commerce, again saying (p. 196):

> This power, *like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution.* These [limitations] are expressed in plain terms. * * * The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are,

> in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied to secure them from abuse. They are the restraints on which the people must often rely solely, in all representative governments.

No intimation is to be found in this language about an implied power, lodged somewhere in the Constitution, which would authorize the court to declare void the laws of Congress imposing taxes in harmony with the limitations expressed therein.

But this view does not find expression alone in the opinions in *McCulloch* v. *Maryland* and *Gibbons* v. *Ogden*. Over and over again it has been repeated by this court down to the present time. Time and again has the court said that, subject to the exception that Congress can not tax exports, and to the restrictions that it must impose direct taxes by the rule of apportionment and indirect taxes by the rule of uniformity, the power of taxation in Congress is unlimited; and that if the power be exercised oppressively, the appeal lies alone to the people and not to the courts.

Thus, speaking by Chief Justice Chase in the *License Tax Cases* (5 Wall., 462), the court says (p. 471):

> It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress can not tax exports, and it must impose direct taxes by the rule of apportionment, and

> indirect taxes by the rule of uniformity. *Thus limited, and thus only*, it reaches every subject, and may be exercised at discretion.

This language was quoted with approval in *Knowlton* v. *Moore* (178 U. S., 41), Mr. Justice White speaking *for the court (p. 58)*:

> It is not denied that, subject to a compliance with the limitations in the Constitution, the taxing power of Congress extends to all usual objects of taxation. Indeed, as said in the *License Tax Cases* (5 Wall., 462, 471), after referring to the limitations expressed in the Constitution, "thus limited, and thus only, it (the taxing power of Congress) reaches every subject, and may be exercised at discretion."

It is also quoted with approval by Mr. Justice White in his concurring opinion in the case of *Dooley* v. *United States* (183 U. S., 151, 166).

In *Pacific Insurance Co.* v. *Soule* (7 Wall., 433), the court, speaking by Mr. Justice Swayne, discussing the limitations of the Constitution upon the power of Congress to levy taxes, says (p. 443):

> Where the power of taxation, exercised by Congress, is warranted by the Constitution, as to mode and subject, it is, necessarily, unlimited in its nature. *Congress may prescribe the basis, fix the rates, and require payment as it may deem proper.* Within the limits of the Constitution it is supreme in its action. *No power of supervision or control is lodged in either of the other departments of the Government.*

Again (p. 446):

> The taxing power is given in the most comprehensive terms. The only limitations imposed are: That direct taxes, including the capitation tax, shall be apportioned; that duties, imposts, and excises shall be uniform; and that no duties shall be imposed upon articles exported from any State. *With these exceptions, the exercise of the power is, in all respects, unfettered.*

In *Austin* v. *The Alderman* (7 Wall., 694), Mr. Justice Swayne, delivering the opinion of the court, says (p. 699):

> The right of taxation, where it exists, is necessarily unlimited in its nature. It carries with it inherently the power to embarrass and destroy.

In *Veazie Bank* v. *Fenno* (8 Wall., 533), this court, speaking by Chief Justice Chase, in answering the contention that because the tax was oppressive, the court should declare the law invalid, says (p. 548):

> It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is, therefore, beyond the constitutional power of Congress.
>
> The *first answer* to this is, that the judicial can not prescribe to the legislative departments of the Government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised

> oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So, if a particular tax bears heavily upon a corporation, or a class of corporations, it can not, for that reason only, be pronounced contrary to the Constitution.

Opposing counsel (Mr. Guthrie's brief, p. 45) try to escape the effect of this language by stating that the tax was sustained upon the ground that Congress, in the exercise of its authority to regulate the currency, could adopt any suitable means for that purpose, and not upon the ground that the court could not interfere with the discretion of Congress in the imposition of the tax. The court sustained the tax upon both grounds. The court says that "the *first answer is* that the judicial can not prescribe to the legislative departments of the Government limitations upon the exercise of its acknowledged powers." And then, after using the language above quoted, the court continues (p. 548):

> *But there is another answer* which vindicates *equally* the wisdom and the power of Congress.

And then proceeds to uphold the tax upon the further ground that Congress has the power to regulate the currency. So it was unnecessary, in deciding *Hepburn* v. *Griswold* (8 Wall., 603), and *National Bank* v. *United States* (101 U. S., 5, 6), to assign any reason for the judgments other than

that of the power to regulate the currency. In the *Hepburn* case, the question of taxation was neither involved nor raised; while in the *National Bank* case, the court follows the decision in the Veazie Bank case. The court says in the *Veazie Bank* case there are *two* reasons why the tax should not be declared invalid—because of its lack of power to prescribe a limitation upon Congress in exercising its legitimate functions, and because Congress has the authority to regulate the currency.

And Mr. Justice Gray, speaking for the court, in *Spencer* v. *Merchant* (125 U. S., 355), says:

> In the words of Chief Justice Chase, condensing what had been said long before by Chief Justice Marshall, "*The judicial department can not prescribe to the legislative department limitations upon the exercise of its acknowledged powers.* The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected."

FURTHER AS TO THE SEPARATE POWERS OF THE THREE COORDINATE BRANCHES OF THE GOVERNMENT.

It is insisted (in effect) that this court should invade the province of the legislative branch of the Government, and, although acting within the limits of its acknowledged powers, should supervise its action. This, the court has said, it can not properly do.

Thus, in *Hayburn's Case* (2 Dallas, 410), the court said: "That by the Constitution of the United States, the Government thereof is divided into three distinct and independent branches, *and that it is the duty of each to abstain from, and to oppose, encroachments on either.*"

In *Calder* v. *Bull* (3 Dallas, 386), there was involved the validity of a resolution passed by the legislature of Connecticut, setting aside the decree of a court of probate of that State disapproving of a will and granting a new trial. This resolution, it was claimed, was *ex post facto*, and therefore void. But the court, each member delivering an opinion, held the term *ex post facto*, as used in the Federal Constitution, applied only to crimes, pains, and penalties. Mr. Justice Iredell, in his concurring opinion, points out that in Connecticut the legislature, or general court of that State, originally possessed and exercised all legislative, executive, and judicial authority, and that from time to time they distributed the two latter powers in such manner as they thought proper. Speaking then of a government in which these powers have been separated and vested in distinct branches, he discusses the power of one branch to declare void the acts of another when the latter is acting within the scope of its authority, saying (bottom p. 398):

> If, then, a government, composed of legislative, executive, and judicial departments were established by a constitution which

imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact, would be lawfully enacted, and the judicial power could never interpose to pronounce it void. It is true, that some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I can not think that, under such a government, any court of justice would possess a power to declare it so. Sir William Blackstone, having put the strong case of an act of Parliament, which should authorize a man to try his own cause, explicitly adds, that even in that case "there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as to leave no doubt whether it was the intent of the legislature, or no." (1 Bl. Com., 91.)

In order, therefore, to guard against so great an evil, it has been the policy of all the American States, which have, individually, framed their State constitutions since the Revolution, and of the people of the United States, when they framed the Federal Constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any act of Congress, or of the legislature of a State, violate those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the court will never resort

to that authority, but in a clear and urgent case. If, on the other hand, the legislature of the Union, or the legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the court can not pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard; the ablest and the purest of men have differed upon the subject; and all that the court could properly say, in such an event, would be, that the legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice. There are then but two lights, in which the subject can be viewed: First, if the legislature pursue the authority delegated to them, their acts are valid. Second, if they transgress the boundaries of that authority, their acts are invalid. In the former case, they exercise the discretion vested in them by the people, to whom alone they are responsible for the faithful discharge of their trust; but in the latter case, they violate a fundamental law, which must be our guide, whenever we are called upon as judges to determine the validity of a legislative act. * * *

It is not sufficient to urge, that the power may be abused, for, such is the nature of all power—such is the tendency of every human institution; and it might as fairly

> be said, that the power of taxation, which is only circumscribed by the discretion of the body, in which it is vested, ought not to be granted, because the legislature, disregarding its true objects, might, for visionary and useless projects, impose a tax to the amount of nineteen shillings in the pound. We must be content to limit power where we can, and where we can not, consistently with its use, we must be content to repose a salutary confidence. It is our consolation that there never existed a government, in ancient or modern times, more free from danger in this respect than the Governments of America.

In *Griswold* v. *Hepburn* (8 Wall., 603) Mr. Justice Miller (with whom concurred Mr. Justice Swayne and Mr. Justice Davis) in his dissenting opinion comments upon the opinion of the court in declaring the act of 1862, making the notes and bills of the United States a legal tender for the payment of all debts, to be inconsistent with the Constitution, saying (pp. 637, 638):

> But it is said that the law is in conflict with the spirit, if not the letter, of several provisions of the Constitution. * * *
>
> This whole argument of the injustice of the law, an injustice which if it ever existed, will be repeated by now holding it wholly void, and of its opposition to the spirit of the Constitution, is too abstract and intangible for application to courts of justice, and is, above all, dangerous as a ground

> on which to declare the legislation of Congress void by the decision of a court. It would authorize this court to enforce theoretical views of the genius of the Government, or vague notions of the spirit of the Constitution and of abstract justice, by declaring void laws which did not square with those views. *It substitutes our ideas of policy for judicial construction, an undefined code of ethics for the Constitution, and a court of justice for the National Legislature.*
>
> Such is not my idea of the relative functions of the legislative and judicial departments of the Government. Where there is a choice of means the selection is with Congress, not the court. If the act to be considered is in any sense essential to the execution of an acknowledged power, the degree of that necessity is for the legislature and not for the court to determine.

The decision of the court in this case was overruled, in part, in the *Legal Tender cases* heard before the entire court; and the views above expressed by Mr. Justice Miller are not only in harmony with the ultimate decision of the court in the Legal Tender cases, which is settled law to-day, but are in strict accordance with many earlier and later decisions of this court as here reviewed.

In the *Legal Tender cases* (12 Wall., 457) the court, answering the objection that the Legal Tender acts were prohibited by the spirit of the Fifth Amendment, which forbids the taking of private

property for public use without just compensation or due process of law, says (p. 551) that "that provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power."

Further answering this contention, the court continues (p. 552):

> Admit it was a hardship, but it is not every hardship that is unjust, much less that is unconstitutional; *and certainly it would be an anomaly for us to hold an act of Congress invalid merely because we might think its provisions harsh and unjust.*

Respecting the division of powers under the Federal Constitution, this court, speaking through Mr. Justice Miller, in *Kilborn* v. *Thompson* (103 U. S., 168), says (p. 190):

> It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to governments, whether State or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these respective departments shall be broadly and clearly defined. *It is also essential to the successful working of this system that the persons intrusted with power in any*

> *one of these branches shall not be permitted to encroach upon the powers confided to others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.*

In *Treat* v. *White* (181 U. S., 264) there was involved the validity of the provision of section 25, Schedule A, of the war-revenue act of June 13, 1898 (30 Stat., 458), which imposed a tax of 2 cents on each $100 in value of all sales, or agreements to sell, etc., shares or certificates of stock in any association, company, or corporation.

It was contended that this provision was invalid because, while imposing the tax upon all sales, agreements of sale and agreements to sell, such shares or certificates of stock, it imposed no tax upon agreements to buy such stocks. Respecting this contention, the court, speaking by Mr. Justice Brewer, says (bottom p. 268):

> That no stamp duty was imposed on agreements to buy furnishes no ground for denying the validity of the stamp duty on agreements to sell. The power of Congress in this direction is unlimited. *It does not come within the province of this court to consider why agreements to sell shall be subject to the stamp duty and agreements to buy not.* It is enough that Congress in this legislation has imposed a stamp duty upon the one and not upon the other.

In *Patton* v. *Brady, Collector* (184 U. S., 608), the court, speaking by Mr. Justice Brewer, overruled a similar contention, saying (p. 623):

> Our conclusion, then, is that it is within the power of Congress to increase an excise as well as a property tax, and that such an increase may be made at least while the property is held for sale and before it has passed into the hands of the consumer; *that it is no part of the function of a court to inquire into the reasonableness of the excise, either as respects the amount, or the property upon which it is imposed.*

In *Champion* v. *Ames* (188 U. S., 321), speaking in respect of the right of this court to interfere with the discretion of Congress when acting within the scope of its power, Mr. Justice Harlan, delivering the opinion, says (p. 363):

> But if what Congress does is within the limits of its power, and is simply unwise or injurious, the remedy is that suggested by Chief Justice Marshall in *Gibbons* v. *Ogden*, when he said: "The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."

The Constitution has provided the authority and the method for proper revision of legislative action in the veto power conferred on the President by Article I, section 7, clause 2. To the Executive, then, is given the right to supervise and check legislation which he deems, in the exercise of his constitutional power of judgment and discretion, to be unwise or unjust.

For these reasons the conclusion seems irresistible that Congress, having acted clearly within the scope of its undoubted power in imposing this excise, this court is not invested with authority to review the discretion reposed in that body by the people and to declare the tax invalid if, perchance, in its opinion, the tax may seem to be oppressive. To do so, as shown by Mr. Justice Iredell in *Calder* v. *Bull*, would merely be to substitute the judicial judgment for that of the legislative power. As the court has said, if Congress has abused its power the remedy lies with the people and not in the courts.

VI.

SECTION 14 DOES NOT CONFER JUDICIAL POWER UPON THE COMMISSIONER OF INTERNAL REVENUE; OR, SO FAR AS IT MAY INCLUDE A QUASI-JUDICIAL FUNCTION, IT IS VALID UNDER THE DECISIONS OF THE COURT.

Counsel also except to the following provision of section 14 of the act:

> And such Commissioner is authorized to decide what substances, extracts, mixtures, or compounds which may be submitted for

his inspection in contested cases are to be taxed under this act; and his decision in matters of taxation under this act shall be final.

It is claimed that this is an attempt on the part of Congress to confer upon an executive officer judicial power. But it is not. It is nothing more than a conferring of authority to ascertain facts, and to apply the law to the facts when ascertained. True, it is a quasi-judicial power; but every taxing officer is invested with that. There is a great distinction between such authority and judicial power within the meaning of the Constitution. The Commissioner in determining whether an article is oleomargarine, or whether it is artificially colored, does not hear and decide a case as a judge does. He simply exercises the judgment and discretion generally required of all administrative officers, and specifically required under many laws, similar in principle, which have been sustained by the court. In order to a correct determination of the facts an analytical chemist and a microscopist are furnished who make the tests necessary to determine the character of the article. This, in the case of oleomargarine, is but the determination of a scientific fact by a scientific process. His decision must be based upon the result of these tests, and the testimony of the experts making them. If the matter were committed to the decision of a court the court would be compelled to determine the question upon the same test and

upon the testimony of like experts. And so if the matter were submitted to a jury. There is no reason why an executive officer may not decide questions of this character in matters of taxation. The question is purely one of fact; the principle of judicial power is not involved. This is not a matter involving title to property, or a right of action against some adversary party; it is not the subject of a suit at common law, or in equity, or admiralty; it is but the ascertainment of certain facts in a matter of taxation and applying the law to those facts.

In support of the position of the Government that the provision challenged is not an attempt to confer judicial power within the constitutional meaning of the term, the attention of the court is called to the following cases:

In *Martin* v. *Mott* (12 Wheat., 19, 29, 31) there was involved the validity of the act of Congress of 1795, which conferred upon the President the power to call upon the militia of the States to prevent invasion, etc. The court upheld the act, holding that Congress had the right to vest exclusively in the President this power, and that his decision upon the matters so committed to him is conclusive upon all other persons.

In *Railroad Co.* v. *Stimpson* (14 Peters, 448, 458), the court held (p. 458) that where the law confers upon an officer the authority to do certain acts, upon evidence and proofs to be laid before him,

no other tribunal is at liberty to reexamine or controvert the sufficiency of such proofs when the law has made such officer the proper judge of their sufficiency and competency.

Murray's Lessees v. *Hoboken Land Company* (18 How., 272).

There was involved in this leading case the power of Congress to vest in the accounting officers of the Treasury the authority to examine the accounts of collectors, to ascertain any balances due, upon which finding distress warrants might issue for any sums so found due the Government from the collectors. It was contended that by so providing in the act of May 15, 1820, Congress attempted to confer upon executive officers judicial powers, and further, that such a taking of property would be without due process of law. Discussing these objections, the court, speaking by Mr. Justice Curtis, says (bottom p. 275):

> Taking these two objections together, they raise the questions, whether, under the Constitution of the United States, a collector of customs, from whom a balance of account has been found to be due by accounting officers of the Treasury, designated for that purpose by law, can be deprived of his liberty, or property, in order to enforce payment of that balance, without the exercise of the judicial power of the United States, and yet by due process of law, within the meaning of those terms in the Constitution; and if so, then, secondly, whether the warrant in question was such due process of law.

The court, after discussing the nature of the power conferred, and the history and meaning of due process of law, held that the power conferred *was not judicial*, in the sense in which that term is used in the Constitution, and that due process of law had been provided, saying (p. 280):

> That the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act, must be admitted. So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. In this sense the act of the President in calling out the militia under the act of 1795 (12 Wheat., 19), or of a commissioner who makes a certificate for the extradition of a criminal, under a treaty, is judicial. But it is not sufficient to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact. (*United States* v. *Ferreira*, 13 How., 40.) It is necessary to go further, and show not only that the adjustment of the balances due from accounting officers may be, but from their nature must be, controversies to which the United States is a party, within the meaning of the second section of the third article of the Constitution.

Again (p. 284):

> To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter

> which, from its nature, is the subject of a suit at common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper. * * * Thus it has been repeatedly decided in this class of cases, that upon their trial the acts of executive officers, done under the authority of Congress, were conclusive, either upon particular facts involved in the inquiry or upon the whole title (citing cases).

The question involved in the cases here before the court is not "the subject of a suit at common law, or in equity, or admiralty."

Again (p. 282):

> It may be added, that probably there are few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others.

Speaking with respect to the nature of the power conferred upon the officers of the General Land Office, and of the power of a court of equity to review their action in cases of fraud, etc., this court, speaking by Mr. Justice Matthews in *Craig* v. *Leitensdorfer* (123 U. S., 189), says (p. 211):

> This doctrine is undoubtedly true, but its limitation is found in the statement that such rulings "may be reviewed and annulled by the courts when a controversy arises founded upon their decisions." The jurisdiction to determine such questions does not arise in the courts of the United States by virtue of any power of supervision given to them whereby they have a right to control, to correct, to reverse, and to dictate the procedure and action of executive officers within the scope of the duties confided to them by law. No such power of revision is given, and none such can be exercised. *Such a function is not judicial; it is administrative, executive, and political in its nature.*

In *Bushnell* v. *Leland* (164 U. S., 684), it was claimed that the power vested in the Comptroller of the Currency to appoint a receiver for an insolvent bank, etc., was unconstitutional. The court answers this claim by saying (bottom p. 685) that "all of these contentions have been long since settled, and are not open to further discussion." Citing *Kennedy* v. *Gibson*, 8 Wall., 498; *Casey* v. *Galli*, 94 U. S., 673; *United States* v. *Knox*, 102 U. S., 422.

The court, speaking by Mr. Justice Gray in *Fong Yue Ting* v. *United States* (149 U. S., 698, 714), said:

> It is no new thing for the law-making power, acting either through treaties made by the President and Senate, or by the more common method of acts of Congress, to submit the decision of questions, not necessarily of judicial cognizance, either to the final determination of executive officers, or to the decision of such officers in the first instance, with such opportunity for judicial review of their action as Congress may see fit to authorize or permit.

The court then cites instances in which such questions have been vested in executive officers for determination. Thus the power has been vested in the President alone to surrender fugitives from the justice of other countries, vesting in the Secretary of the Treasury the power to determine claims for the recovery of duties illegally exacted, citing cases (p. 714).

The court, speaking by Mr. Justice Harlan, reaffirmed this principle in *Lem Moon Sing* v. *United States* (158 U. S., 538, 544), quoting with approval the following passage from *Nishimura Ekiu* v. *United States* (142 U. S., 651, 660):

> But, on the other hand, the final determination of those facts may be entrusted by Congress to executive officers; and in such a case, as in all others in which a statute gives a discretionary power to an officer to

> be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to reexamine or controvert the sufficiency of the evidence on which he acted.

In *Chin Bak Kan* v. *United States* (186 U. S., 193) the court, speaking by the Chief Justice and referring to the findings of fact by a United States commissioner under the Chinese exclusion laws, again sustained the principle of the finality of such findings.

In *United States* v. *Moline* (82 Fed. Rep., 592) the authority of the Secretary of War to determine whether a particular structure is an obstacle to navigation is held to be a purely administrative function and to be a valid delegation of power by Congress.

See also *Chatfield* v. *New Haven* (110 Fed. Rep., 788).

The power to impose certain requirements by Department regulations, in pursuance of a law which was challenged as an illegal delegation of judicial power, just as the power to determine facts here is so challenged, has been upheld in numerous cases, in accordance with the rule in *In re Kollock* (*supra*); among others, in *Grady* v. *United States* (98 Fed. Rep., 238), respecting a power conferred upon the Postmaster-General to make rules and regulations under the postal laws;

and in *Dastervignes* v. *United States* (122 Fed. Rep., 30), respecting the authority of the Secretary of the Interior to make regulations as to forest-reserve lands.

In *Weimer* v. *Bunbury* (30 Mich., 201) there was involved a State law authorizing summary proceedings under certain circumstances to recover from a delinquent officer taxes which he had collected but failed to cover into the treasury. Judge Cooley delivered the opinion of the court, and discusses the meaning of "due process" and "judicial process," saying (p. 211):

> There is nothing in these words, however, that necessarily implies that *due process* of law must be *judicial process*. Much of the process by means of which the Government is carried on and the order of society maintained is purely executive or administrative. * * * But the proceedings for the collection of the public revenue afford still better illustration. Almost universally these are conducted without judicial forms and without the intervention of the judicial authority, the few cases in which statutes have required the action of courts being exceptional. Where such action is not required, the proceedings are regarded as purely administrative, and any hearing allowed to parties in their progress has not been in the nature of a trial, *but as a means of enlightening the revenue officers upon the facts which should govern their action*. This has been so from time immemorial, and it

> has never been supposed that the taxpayer had a constitutional right to resist the tax because he had never had any judgment against him on a judicial hearing to fix the amount.

These views exactly apply to the present situation and to the method of procedure provided by the law.

Judge Cooley continues (bottom p. 212):

> There are, unquestionably, cases in which expressions have been used implying the necessity for a common-law trial before, in any instance, a man can be deprived of his property; but they will be found on investigation to be cases calling for no such sweeping statement. *If any court has ever decided that judicial proceedings are of constitutional necessity in appropriating property under the power of taxation, the case has not been brought to our attention, and has been overlooked in our investigation.* * * * *Administrative process of the customary sort is as much due process of law as judicial process.* We should meet a great many unexpected and very serious embarrassments in government if this were otherwise.

In *State* v. *Harmon* (31 Ohio St., 250), it was claimed that the action of the State senate in deciding a contested election of a judge of a court was void, being an exercise of judicial power. Respecting this the court says (p. 258):

> It is said authority to hear and determine

a controversy upon the law and fact is judicial power.

That such authority is essential to the exercise of judicial power, is admitted; but it does not follow that the exercise of such authority is necessarily the exercise of judicial power.

The authority to ascertain facts, and to apply the law to the facts when ascertained, appertains as well to the other departments of the Government as to the judiciary. Judgment and discretion are required to be exercised by all the departments.

See also *Musser* v. *Adair* (55 Ohio St., 466); *Anderson* v. *Timme* (60 Wis., 344); *Donahue* v. *Will County* (100 Ill., 107–110).

VII.

THE EFFECT OF THE ALLEGED VOID PROVISION AND AMENDMENT.

It is suggested that in case the provision in section 14 of the original act, and the amendment of section 8 of that act by section 3 of act of 1902, be held void, the entire law falls, and counsel refer to a number of cases which bear upon the question of void amendments as working a repeal of the law. These authorities do not, however, meet the question here.

This is not a penal law, but a revenue measure, and therefore its provisions are to be liberally construed. If the court were to hold invalid that provision of section 14 which confers upon the

Commissioner authority to determine finally what substances are subject to the tax, the only effect would be to take from that officer finality of decision; and upon a prosecution for the purpose of imposing punishment, or a suit to recover a penalty, that question might be gone into anew. The act would be complete without that provision, and the only effect such a decision could have would be to strike the provision from the act. As said by this court, speaking through Mr. Justice Harlan, in *Field* v. *Clark* (143 U. S., 649, 696, 697):

> Unless it is impossible to avoid it, a general revenue statute should never be declared inoperative in all its parts because a particular part relating to a distinct subject may be invalid.

It is also a well-settled rule that where certain parts of an act are void, and other parts valid, if the valid portions are separable and, standing alone, will fully carry out the purposes of the act, the court will not declare the whole act void, but will give effect to the valid provisions. (*Packet Co.* v. *Keokuk*, 95 U. S., 89; *Allen* v. *Louisiana*, 103 U. S., 83–84; *Railroad Co.* v. *Schutte*, 103 U. S., 142; *Penniman's Case*, 103 U. S., 716–717; *Supervisors* v. *Stanley*, 105 U. S., 312; *Virginia Coupon cases*, 114 U. S., 304; *Presser* v. *Illinois*, 116 U. S., 263–264; *Huntington* v. *Worthen*, 120 U. S., 102; *Eilenbecker* v. *Plymouth County*, 134 U. S., 40; *Pollock* v. *Farmers' Loan and Trust Co.*, 158 U. S., 636.)

The cases of *Spraige* v. *Thompson* (118 U. S., 94) and *James* v. *Bowman* (190 U. S., 141), cited by counsel, are not to the contrary. The laws involved in those cases were declared wholly void, because to give effect to the valid portions only would be to extend the operation of the laws beyond the intention of the legislative body, and, to that extent, would be judicial legislation. And the *Spraige* case has been so distinguished by this court. (*Pollock* v. *Farmers' Loan and Trust Co.*, 158 U. S., 636.)

So, in the *Trade-Mark Cases* (100 U. S., 82, 98), the court held the entire act invalid for the reason that to hold the statutes valid in so far as they applied to trade-marks used in commerce with foreign nations and among the several States would be to give to the words used by Congress a narrower meaning than they were manifestly intended to bear, a power not within the judicial province.

No one will pretend to say that, by declaring void the provision of section 14 called in question, the act can not be fully carried into effect; or that, but for that provision, Congress would not have enacted this legislation. That provision is not material to the imposition and collection of the tax, but is merely an incident to facilitate its collection.

With respect to amended section 8, conceding, merely for the purposes of argument, that the amended section is void, what effect will that

have upon the original law? What effect does a void amendment have upon a valid law? The Government contends that if the amendment be void, since there is no express repeal in the act of 1902 of any provision of the act of 1886, section 8, as enacted by the law of 1886, is in full force, and therefore that all oleomargarine, irrespective of its color, is subject to a tax of 2 cents per pound. This must be so if the amendment be void, for, as said by Mr. Justice Harlan, speaking for the court in *Norton* v. *Shelby County* (118 U. S., 442):

> An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.

If Congress had, by express language, repealed the old law, the amendment of 1902 being held void, there would, of course, be in existence no law imposing a tax upon the article. But the act of 1902 does not, by express language, or by any language or implication, repeal any provision of any law; hence, if the amendment of section 8 is of no effect, the original section is in full force.

VIII.

REPLY TO THE BRIEFS FOR PLAINTIFFS IN ERROR.

In discussing the issues raised by these cases, reference has heretofore been made to the points suggested in the briefs of opposing counsel only so far as necessary to carry out the general line of

argument presented. I now take up the objections more at large.

(1) The act is a revenue measure, and does not attempt to regulate the manufacture of oleomargarine.

I have already touched upon this question, contending that there is no interference with State powers and that Congress has the power to select the objects of taxation, to determine the rate, and to provide the means for the collection of the tax. Having the power to designate the manner of the collection of the tax, it may throw around its collection such safeguards as, in its judgment, it deems necessary in order to prevent frauds upon its revenue. In the determination of the rate and in the selection of the means of enforcement, Congress may take into consideration the character of the article to be taxed, the purpose for which it is used, its methods of use, and the probability of fraud for the purpose of evading the tax. In passing this law, therefore, Congress could properly take into consideration all facts of which it had knowledge, or which might be brought to its notice respecting the character of oleomargarine, the uses to which it is put, the manner of its use, and, acting upon that information, lay the tax and provide for its collection, using such means as it deemed appropriate and necessary.

Counsel for the Chicago dealers in their brief (p. 17) concede that in examining into the motive

or purpose which Congress had in view in passing the act, it is not proper to refer to the debates; and counsel for McCray, while conceding the rule (brief, p. 14), quotes certain extracts from the debates as "illustrative of the history of the law and the condition of the country and existing legislation at the time it was passed." But the extracts quoted show only the views of those quoted as to the purpose of the tax, which this court will not consider. The rule upon this point is stated by Mr. Justice Davis in *United States* v. *Union Pacific Railroad Co.* (91 U. S., 79) in this language:

> In construing an act of Congress, we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influenced them to vote for or against its passage. The act itself speaks the will of Congress, and this is to be ascertained from the language used. But courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it. (*Aldridge* v. *Williams*, 3 How., 24; *Preston* v. *Browder*, 1 Wheat., 120.)

And, in *Soon Hing* v. *Crowley* (113 U. S., 703, 710), the rule is stated in these words, Mr. Justice Field delivering the opinion:

> The rule is general with reference to the enactments of all legislative bodies that the courts can not inquire into the motives of

> the legislators in passing them, except as they may be disclosed on the face of the acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile.

And this rule has been reaffirmed in *Powell* v. *Penna.*, 127 U. S., 685, 686; *United States* v. *Freight Association*, 166 U. S., 318; *Camfield* v. *United States*, 167 U. S., 523; *Dunlap* v. *United States*, 173 U. S., 75; *Maxwell* v. *Dow*, 176 U. S., 601; *Knowlton* v. *Moore*, 178 U. S., 72, and other cases. See also *Dobbins* v. *Los Angeles*, 72 Pacific Rep., 971; Cooley's Const. Lim. (6th ed.), page 231.

The reasonable presumption is that Congress in imposing this tax acted with full knowledge of all the facts respecting the subject-matter thereof, and because of such facts imposed the tax in question. Now, what facts did Congress have before it respecting oleomargarine of which this court will take judicial notice; and as bearing

upon that question, of what facts will this court take judicial notice?

In *Brown* v. *Piper* (91 U. S., 42, 43) the court said that "the courts of the United States take judicial notice of the laws and jurisprudence of the several States in which they exercise jurisdiction;" and that "courts will take notice of whatever is generally known within the limits of their jurisdiction." And this rule was adhered to in *Brown* v. *Spillman* (155 U. S., 670). In *Mills* v. *Green* (159 U. S., 657) it is said that "the lower courts of the United States, and this court, on appeal from their decisions, take judicial notice of the constitution and public laws of each State of the Union." In *Bank of Kentucky* v. *Adams Express Co.* (93 U. S., 185) the court says it can not close its eyes to the well-known course of business in the country. So in *Nicol* v. *Ames* (173 U. S., 517) the court says it has "the right to consider facts without particular proof of them, which are universally recognized and which relate to the common and ordinary way of doing business throughout the country." In *The Delaware* (161 U. S., 472) the court, in substance, says that it will take judicial notice of that which is a part of the history of the times. In *United States* v. *Rio Grande Dam and Irrigation Co.* (174 U. S., 698) the court says that it will take judicial notice of that which is a matter of common knowledge within its jurisdiction. In *Bank of Augusta* v. *Earle* (13 Pet., 590, 591) the

court takes judicial notice of general usages of commerce and trade.

In *New York Indians* v. *United States* (170 U. S., 32), with respect to matters of which it will take judicial notice, the court, speaking by Mr. Justice Brown, says:

> While it is ordinarily true that this court takes notice of only such facts as are found by the court below, it may take notice of matters of common observation, of statutes, records or public documents, which were not called to its attention, or other similar matters of judicial cognizance.

See also 1 Greenleaf on Evidence, sections 5 and 6.

So that the court will not explore the motives of legislators as drawn from debates, but will notice well-known facts and situations in the life and business of the times.

It becomes important here to point out the well known facts, not only for the purpose of showing the fundamental state of affairs upon which the will of Congress acted and that Congress was justified in laying the discriminating tax upon the colored article, but also as showing that, because of the character and magnitude of the traffic in that article, Congress might properly impose the heavy tax upon it not only for direct revenue thereon but also for the purpose of preventing frauds upon the revenue in the collection of the tax upon the uncolored article. In short, opening the

door *pro arguendo* to facts properly excluded by the courts below, the Government contends that the discriminating tax of 10 cents per pound upon the colored oleomargarine can be sustained upon two grounds: (1) That the classification is proper because the uncolored article can only be sold for what it really is, and at its true value; that the sole purpose or the main purpose of coloring oleomargarine is to make it so closely resemble butter (an article of double its value) that it may very readily be sold as and for butter, and at double the price that can be obtained for it when sold for what it really is; that even if it is candidly *sold* for what it really is, it is likely to be unwittingly *consumed* for the genuine article which it resembles. Thus the line is drawn between legitimate commerce and a trade which, even if recognized, is at least disingenuous and doubtful. (2) Congress having full knowledge of the character and magnitude of the trade in butter and its imitations, and of the nature and incidents of the business in colored oleomargarine, may, as part of its entire revenue scheme and incidentally to detect and prevent fraud in collection, distinguish the colored and uncolored articles and lay a heavy tax upon the colored article, inevitably imitative and fraudulent in effect.

(2) Further as to the propriety of the classification.

It becomes necessary, then, to call attention to the magnitude of the traffic in the colored article

and to its character, and, as showing that fact, to the prohibitions and restrictions placed by the States upon the sale of the article.

The court has said that it will take judicial notice of the laws and jurisprudence of the States of the Union; and the court is consequently presumed to know that forty-two States and Territories of the Union have passed stringent laws requiring the branding of all oleomargarine (whether colored or uncolored) manufactured or sold therein, so as to advise all purchasers of its true character, and requiring dealers engaged in selling it to give due notice to their customers to that effect; and requiring hotels and restaurants to advise their patrons in case they use oleomargarine as a substitute for butter. The court is also presumed to know that twenty-nine States[a] of this Union have absolutely prohibited the manufacture and sale (in one[b] instance the sale alone) of all oleomargarine colored so as to resemble butter; and heavy penalties are provided by the forty-two States and Territories for any violation of these laws. In addition to this, most of the remaining States have laws prohibiting the false branding of any article of food, which would prohibit the selling of oleomargarine for anything other than it really is.

[a] Alabama, California, Colorado, Connecticut, Georgia, Idaho, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, South Dakota, Utah, Virginia, Washington, West Virginia, and Wisconsin.

[b] Missouri, while permitting the manufacture, prohibits the sale of colored oleomargarine.

West Virginia requires all olemargarine to be colored pink.

For the information of the court a condensed summary of the laws of the States and Territories regulating the manufacture and sale of oleomargarine is printed as an appendix to this brief and marked "Appendix B."

Congress must be presumed to have been aware of all these laws, and of all the incidents of the trade upon which they operated, supply, demand, use, profits—profits obviously very great and properly enough burdened accordingly. Congress legislated, no doubt, and it was entirely right for Congress so to legislate, in the light of these widespread laws and the universal situation which they revealed.

Is there not a sufficient distinction between uncolored oleomargarine which can only be sold for what it really is, at, perhaps, from 10 to 12 cents per pound, and the same article disguised by means of a little coloring matter so as to resemble and to be sold for the best creamery butter at from 20 to 24 cents per pound, to justify Congress in classifying the two forms of the article for purposes of taxation? The dealers say Congress can not make this distinction, this classification for taxation. But they concede the distinction for purposes of sale while denying it for purposes of taxation. In their testimony and in the briefs of their counsel they recognize a distinction. They complain that they can not sell the uncolored article as a substitute for butter. It is not unfair

to suggest that the real complaint is that unlike colored oleomargarine it can not be sold as and for butter. But they say the colored article they can sell as a *substitute* for creamery butter. Now, however it may be sold, it is notoriously used and consumed *as and for* creamery butter.

A line of cases in this court and in lower Federal courts deals with oleomargarine under State laws, and with certain aspects of this law presenting the real and essential nature of the business. We cite the cases of *Powell* v. *Penna.*, 127 U. S., 678; *Plumley* v. *Mass.*, 155 U. S., 461; *Schollenberger* v. *Penna.*, 171 U. S., 1; *Collins* v. *New Hampshire*, 171 U. S., 30; *Capital City Dairy Co.* v. *Ohio*, 183 U. S., 238; *In re Kollock*, 165 U. S., 526; *Wilkins* v. *United States*, 96 F. R., 837; *United States* v. *Dougherty*, 101 F. R., 439; *Dougherty* v. *United States*, 108 F. R., 56.

In the decisions of this court cited the court recognizes a distinction based upon the character of the article and the traffic by declaring that a State may prohibit the use of a counterfeit article. Thus in the *Plumley case* the court, speaking by Mr. Justice Harlan, says (p. 478):

> We are of the opinion that it is within the power of a State to exclude from its markets any compound manufactured in another State, which has been artificially colored or adulterated so as to cause it to look like an article of food in general use, and the sale of

> which may, by reason of such coloration or adulteration, cheat the general public into purchasing that which they may not intend to buy.

It is quite certain that if the State of Massachusetts had attempted arbitrarily and without good reason to exclude a legitimate and meritorious article of commerce (meritorious, because not seeking or not likely to deceive), this court would not have sustained the law.

There is, then, a clear distinction, a classification or difference recognized by the States in their legislation. The correctness of that distinction has been recognized by this court. So, Congress in imposing the different rates of tax does not arbitrarily create the classification; it finds it already existing, created by the States, recognized by the courts, and lays the tax accordingly.

(3) The tax may be sustained as a means to prevent fraud in the collection of the tax laid upon the legitimate article.

It is a well-established rule that this court will not declare a tax invalid if it can be sustained upon any ground; and, further, that to prevent fraud in the collection of a tax Congress may provide such safeguards as it deems proper. This tax of 10 cents per pound upon the colored article may also be sustained upon the theory that it is a regulation declared by Congress as a means of preventing fraud in the collection of the tax imposed upon the legitimate article, uncolored oleomargarine.

The court may not deem it any more proper to inspect the debates for information as to the purpose and conception of legislators in urging a law than as to their individual opinions as to its intention, or meaning, or effect. Therefore, I submit, with reserve, the suggestion that the debates show a belief or conviction that the high tax on colored oleomargarine was necessary and was justified to prevent fraud in the collection of the tax upon the uncolored article; that is, the genuine variety, as it were, of oleomargarine. The argument is about as follows: The tax of 10 cents per pound imposed upon the imitative article is a regulatory tax legitimately imposed in aid of the collection of the tax levied upon the genuine article; that is, uncolored oleomargarine. There is no tax upon pure butter, and if oleomargarine is so made and colored as not to be distinguishable from butter it might evade the tax imposed upon it. When an article taxed is made to counterfeit an article not subject to tax, Congress may put upon it a higher tax in order to secure identification of the genuine article as against the fraud or counterfeit, which, if successful, evades the tax intended to be imposed upon the genuine article. The degree of the regulatory tax upon the counterfeit or imitation is for Congress, having due regard for the welfare of the people, to determine. (Cong. Rec., 57th Cong., 1st sess.; remarks by Senator Hoar, pp. 3280–3282; Senator Spooner, pp. 3505–3506.)

Again, the law involved here imposes license fees upon the manufacturer and the retail dealer. In aid of the collection of these fees, Congress has the power to impose an added tax upon the counterfeit (I use that term in this brief not as an animadversion, but as conveniently describing the fact), for the reason that, if only the counterfeit passes into the hands of the retail dealer, it will be difficult to tell, without a scientific test, whether the colored article is butter or oleomargarine, thus rendering the tax more doubtful of collection. So, we repeat, that Congress, when taxing an article, has the power to compel the manufacturer of that article to disclose what he is doing; and that if he so disguises the article taxed as to make it possible for an evil disposition readily to escape taxation, Congress may prevent such chance of fraud either by the imposition of a heavy tax, or by such other regulations as it deems suitable to accomplish the purpose.

It rests with Congress to say what means it will adopt to accomplish this purpose.

In the case of *United States* v. *132 Packages of Spirituous Liquors* (76 Fed. Rep., 364) there was involved the validity and construction of section 3449 of the Revised Statutes which prohibits the removing, shipping, or transporting of any spirituous or fermented liquors under any other than the proper name or brand known to the trade. It was contended that this was merely a trade-mark

regulation and beyond the power of Congress, but the court held otherwise, Caldwell, circuit judge, saying (p. 367):

> The contention of the learned counsel for the claimant that this section is nothing but a trade-mark regulation is not tenable. It is one of the numerous regulations prescribed by the internal-revenue laws intended to prevent frauds on the revenue in the manufacture, removal, shipment, and sale of distilled spirits and other liquors and to aid in the detection of such frauds. The regulations for this purpose are very extensive and extremely minute. They embrace every step in connection with the manufacture and handling of spirits, from the introduction of the raw material into the distillery down to the rectification of the product, and its removal, shipment, and sale. * * * Before a court would be authorized to hold an act of Congress obsolete and inoperative, it would have to appear conclusively that it was *totally inoperative for any lawful or useful purpose*. When the statute relates to a subject-matter within the constitutional competency of Congress to legislate upon, the presumption is that it serves a useful purpose. * * * The section is *none the less a revenue regulation* because its enforcement may tend to discourage the piracy of trade-marks, and prevent frauds upon those who consume the contents of the packages. These are mere incidents of the statute, and not its primary object.

> Congress has an undoubted right to legislate to prevent frauds upon the public revenue, and the validity of such legislation is not affected by the fact that it incidentally tends to the discovery or suppression of private frauds.

In *Nicol* v. *Ames* (*ut supra*) the court said: "Other means [than a certain memorandum required by law] might have been resorted to for the same purpose. Whether the means adopted were the best and most convenient to accomplish that purpose was a question for the judgment of Congress and its decision must be conclusive in that respect." To assure the revenue purpose, in other words; to make certain the collection of the tax.

So in *Felsenheld* v. *United States* (186 U. S., 126) the court sustained the power of Congress to prohibit the placing of anything whatever on or inside any package of tobacco. It was claimed that Congress had no power to do this; that it was an attempt to exercise a police power, and that Congress could not pass any provision except such as were helpful to the collection of the tax. The court, speaking by Mr. Justice Brewer, answers this in these words (p. 131):

> Now the contention is that the courts may supervise this system of rules and regulations, and if they find a provision which, in their judgment, in no way secures or facilitates the proper collection of the tax they may strike it down as something beyond the power of Congress. It is said that

the only matter in which the National Government is concerned is the tax; that it is in no manner responsible for what goes into the commercial world covered by its stamp; that it has no police power, no duty of caring for the health or safety of citizens or others who buy articles upon which its stamp is placed; that it does not guarantee either quantity or quality, and, in short, that its power is limited to such provisions as are essential or helpful in the collection of the tax.

It may be conceded that the Government's stamp is not a guaranty of quantity or quality, and that no responsibility attaches to it, although the manufacturer puts into the packages less than the specified quantity of goods or goods of inferior quality. But does it follow that the Government has no power to prescribe that the packages which it stamps, upon which it collects a tax, shall contain the very articles and only the articles which it purports to tax and which its stamp certifies that it has taxed? Take the matter of tobacco; can it be that a manufacturer may fill packages purporting to be of tobacco with half tobacco and half sawdust, and the Government can pass no valid statute to prevent it? If the manufacturer is willing to pay a full tobacco tax on this package, half tobacco and half sawdust, must the Government take the money, affix its stamp,and thus in effect certify that the contents are that which it has imposed a tax upon? Manufactured goods are not

necessarily sold in this country, but may be shipped to other countries and sold there, and can it be that the stamp of this Government is absolutely worthless as an assurance that that which is within the package is the article which the Government purports to have taxed? It is one thing to say that the Government's stamp is not a guarantee of either quantity or quality, and that no liability attaches to it if the manufacturer imposes upon his customers by inserting something which is not that which is stamped, but it is a very different thing to hold that the Government is absolutely powerless to legislate so as to protect the customer and prevent the manufacturer from putting within the package anything but the article which it proposes to tax. Whatever courts may rule as to the constitutional limits of the power of Congress, the great majority of people here and elsewhere will believe in and rely upon the truthfulness of a certificate made by the Government, and will be shocked to be told that it means nothing to them, but only money to the Government.

It seems to us that, in the rules and regulations for the manufacture and handling of goods which are subjected to an internal-revenue tax, *Congress may prescribe any rule or regulation which is not in itself unreasonable.*

May not the Government legislate to this end by the amount of a certain tax as well as by prescribing certain incidental regulations?

The court is so familiar with the various provisions enacted for the purpose of preventing frauds in the collection of the revenue upon liquors and tobacco that it is not necessary to mention them. But we call the attention of the court to the act of March 3, 1897 (29 Stat., 626), providing for the bottling of spirits in bond, as showing the control Congress believes it has over articles which it taxes, which implies something more than a naked power to tax; and as going along with that power a right to say that its stamp denoting the payment of a tax upon a certain article, can not be used upon an article different in character, quality, or amount, from that denoted by the tax.

It is pertinent to say here that I perceive no reason for any fundamental distinction between the cases of liquors and tobacco and that of oleomargarine. All three invoke the taxing power and rest under the burden of heavy taxes. Each presents a certain special situation, common throughout the country and notorious, and upon such well-known situations Congress has acted. Each presents, as moving the taxing power, certain features which involve considerations of general welfare. In each the traffic, while recognized as commerce, rests under a certain ban, a different ban in each case, but referable to the same general principles. The idea of an article, the consumption of which is to be watched and regulated on grounds of general welfare founded in physical and mental hygiene and morals, is

present in the first two cases. The object of revenue and the notions of evasion, counterfeit, and the prevention of fraud on the revenue are common to all. The similarity of the two sets of laws was recognized in *In re Kollock*.

The case of *United States* v. *Singer* (15 Wall., 111) is similar, in some respects, to the case at bar.

In delivering the opinion of the court, Mr. Justice Field, after referring to many of the sections and provisions of the law involved, says (p. 120):

> The system thus adopted was designed to prevent the secret production of spirits and consequent evasion of the Government tax; and it seems well suited to accomplish this purpose. It at least reduces the limits within which fraud can be practiced to 20 per cent of the capacity of the distillery. In view of the enormous frauds previously practiced upon the Government in rendering accounts, this system can not be justly charged with unnecessary harshness. Everyone is advised in advance of the amount he will be required to pay if he enters into the business of distilling spirits, and every distiller must know the producing capacity of his distillery. If he fail under these circumstances to produce the amount for which by the law he will in any event be taxed if he undertake to distill at all, he is not entitled to much consideration.

In *United States* v. *Three Packages of Distilled Spi its* (recently decided; United States district court, eastern district of Missouri), reported in

Treasury Decisions of October 1, 1903, there was involved the construction of section 3455, Revised Statutes, which makes it unlawful to sell any empty barrel or other package which has contained any article or product upon which an internal-revenue tax has been paid, without first destroying the stamps thereon, etc. In discussing the reasons for the statute, Judge Amidon says:

> It is said in many of the decisions to which reference has already been made that the primary object of the internal-revenue law is to prevent frauds upon the revenue. That is no doubt true, but what will best accomplish that purpose is a matter for legislative, not judicial, discretion. In the judgment of Congress, there are many classes of acts which ought to be prohibited because of the possibility of their being done for the purpose of defrauding the revenue.

If it is within the power of Congress to say what regulations are necessary or proper for the purpose of preventing frauds upon any branch of its revenue, then may it not impose a heavier tax upon an article, itself constituting the means by which a fraud may be accomplished, rather than by the adoption of some particular system of regulations, as in the case of distilled liquors?

(4) The tax is not prohibitive of the manufacture and sale of colored oleomargarine.

Reduced to its last analysis, the argument for the dealers is that the tax is unconstitutional because prohibitive of manufacture and sale.

As to the allied point that Congress was interfering with the States, I say again that the act of 1902 shows upon its face that Congress was exercising the taxing power alone. This is apparent from a reading of the whole act, and especially section 5, which relates to process butter. In that section Congress exercises its power to regulate interstate or foreign commerce. That section confers upon the Secretary of Agriculture the power of inspection, and prohibits the entering into interstate (not State) commerce of any butter not bearing the inspection brands of that officer. But nowhere in the sections relating to oleomargarine is any such power, or any power conferred upon that officer, except his function as a member of the board of review provided for by section 14 of the act of 1886. In short, it is a simple taxing law, and was so declared by this court in *In re Kollock* (165 U. S., 526), as to its main and primary purpose.

The argument that the tax is prohibitive of the manufacture and sale of colored oleomargarine is to be considered with reference to the facts about oleomargarine, and on these we again invoke the doctrine of judicial notice and the opinions of this court.

In *Schollenberger* v. *Penna.* (171 U. S., 1) the court discusses the character of oleomargarine, and refers to the reports of the Secretary of the Treasury for the purpose of showing the magnitude of the traffic in that article. Similar in char-

acter to the reports last mentioned, and entitled to the same notice, are the reports of the Twelfth Federal Census, taken in the year 1900. The reports of that census contain statistics which show not only the quantity of butter products and of oleomargarine produced during that year, but also, approximately, the cost and value of the manufactured products. These tables are presumed to contain as accurate information as it is possible to obtain, and to these tables we respectfully call the court's attention.

In volume 9, Manufactures, part 3, on pages 433 to 459, may be found the statistics relating to butter. The following is a summary of the facts there stated respecting the manufacture and cost of butter for the census year of 1900 (p. 437):

Butter made on farms, pounds	1,071,745,127
Butter made in factory creameries, pounds	420,126,546
Butter made in urban dairies, pounds	827,470
Total pounds of butter made	1,492,699,143
Total value of butter made, at 18 cents	$268,685,845

The court will keep in mind the fact that the average value of butter of all grades is fixed at 18 cents per pound. To this fact attention will again be called later on.

On page 435 of the volume is to be found a table (4) showing the number of creameries or butter factories in operation. This table shows that there were in operation in 1900, 5,275 creameries making butter only, and 583 factories making both butter and cheese—a total of 5,858 creameries

engaged in making butter. These creameries were distributed throughout the various States of the United States, as shown by the table, and produced the total of 420,954,016 pounds of butter reported as made in factory creameries and country dairies. On pages 440 and 441 we are given the method of packing, which to a certain extent affects the price, and the average prices received for the product throughout the various States. Thus on page 441 it is stated that the average price received for all butter, as reported by the creameries, was nearly 20.1 cents per pound. The average price for that packed solid, or in tubs, was 19.4 cents; for that packed in rolls, 22.1 cents per pound. The average price received in Connecticut for prints was 24.6 cents; in Massachusetts, 23.5 cents; Pennsylvania, 23.4 cents; in California, rolls, 22.3 cents. The average for butter packed in tubs at Iowa, Minnesota, and Wisconsin creameries was 19 cents; Nebraska, 18 cents, and Kansas, 17 cents. It is this creamery butter that more largely comes into competition with the colored oleomargarine than the butter made on the farm. The average price then on these vast transactions is fixed at 18 cents.

Similar facts as to oleomargarine will be found on pages 517 to 525 of the same volume of the Census Reports. In 1900 there were 24 factories engaged in the manufacture of imitation butter, or oleomargarine; in 1902, 36; and at the present time there are 28, located as follows (the facts

for the periods subsequent to the census tabulation are furnished by the Commissioner of Internal-Revenue from his office records):

States.	Fiscal year ended June 30, 1902.	Present fiscal year, July, 1903.
Colorado	1	1
Rhode Island	5	4
Illinois	10	6
Indiana	3	3
Kansas	3	4
Kentucky	2	0
District of Columbia	1	1
Maryland	1	0
Missouri	1	1
Ohio	4	3
Pennsylvania	1	1
Texas	2	2
New Jersey	2	2
Total	36	28

Upon page 519 of the Census Report, we find this statement:

> The value of the 104,633,214 pounds of oleomargarine (made in 1900) was $12,286,357, an average of 11.7 cents per pound. *This amount represents the value at the factory, packed and ready for shipment, and includes the internal-revenue tax of 2 cents a pound*, which must be paid on withdrawal for sale.

Deducting the internal-revenue tax of 2 cents per pound would give the product a value of 9.7 cents per pound at the factory, which seems to

include, as indicated below, the manufacturers' profit.

On page 518 of the report is to be found the following table, showing the quantity and cost of the materials used in making the product, with the value of the product for that year:

TABLE 3.—*Materials and products: 1900.*

Items.	Quantity.	Cost of materials.	Value of products.
Materials:	*Pounds.*		
Total	114,748,633	$7,639,501	.....
Milk and cream	23,684,395	579,068	.....
Oleo oil	33,724,621	2,744,235	.....
Neutral lard	37,651,741	2,976,870	.....
Cotton-seed oil	11,818,921	567,790	.....
Butter	396,956	61,176	.....
Salt	6,962,233	58,887	.....
Color	204,418	32,078	.....
Sugar	137,842	7,084	.....
Glucose	32,965	494	.....
Stearin and oleo stock	134,541	4,320	.....
Fuel and rent of power and heat	.....	49,855	.....
Mill supplies	.....	5,745	.....
All other materials	.....	501,107	.....
Freight	.....	50,792	.....
Products:			
Total	104,633,214	.....	$12,499,812
Oleomargarine	104,633,214	.....	12,286,357
All other products	.....	.....	213,455

It will be noticed that the cost of the materials set out in this table, including fuel, rent, mill supplies, other materials, and freight, is a little less than $7\frac{1}{3}$ cents for each pound of oleomargarine

manufactured. The average cost per pound of the different ingredients used in the manufacture of the article was as follows:

	Cents per pound.
Milk and cream, about	2.45
Oleo oil, about	8.20
Neutral lard, about	8.00
Cotton-seed oil, about	4.75
Butter, about	15.50
Salt, about	.85
Color, about	15.50
Sugar, about	5.13
Glucose, about	1.50
Stearin and oleo stock, about	3.21

The court will not fail to observe that the disguises (butter and color) constitute the most expensive ingredients that enter into the composition of oleomargarine.

So, if we add to the average value given oleomargarine in 1900, 9.7 cents, the revenue stamp of 10 cents, it will make a value of 19.7 cents per pound, as against an average value of 18 cents for butter of all kinds, of 20.1 cents for creamery butter packed in prints, and 19.4 cents for creamery butter packed in tubs or packages. And it is this creamery butter, rather than butter made upon the farm, that colored oleomargarine more largely competes with. A large portion of the butter from the farm finds its market in the near-by villages and cities, reaching the consumer through the grocers and small dealers; but naturally much of it also comes in direct competition with the counterfeit article. The creamery product, as a rule,

seeks the larger markets. As the court will notice, the oleomargarine is mostly manufactured at the large cities, with a market close at hand, while the creamery product is manufactured all over the country, farther removed from its market, and consequently is subjected to more expense in reaching it. The apparent fact is that the taxing of the colored article at the rate of 10 cents per pound makes its cost just about equal to the cost of the butter it imitates.

I have just above called attention to the fact that butter was by far the most expensive ingredient used in the manufacture of oleomargarine. To better illustrate the increase in the cost of manufacture by reason of the use of a large percentage of butter, I print herewith the three formulas for the manufacture of oleomargarine, found on page 521 of the volume of the Census Report above quoted from:

Formula 1.—Cheap grade.

	Pounds.
Oleo oil	495
Neutral lard	265
Cotton-seed oil	315
Milk	255
Salt	120
Color	1¼
Total	1,451¼

will produce from 1,265 to 1,300 pounds of oleomargarine.

Formula 2.—Medium high grade.

	Pounds.
Oleo oil	315
Neutral lard	500
Cream	280
Milk	280
Salt	120
Color	1½
Total	1,496½

will produce from 1,050 to 1,080 pounds of oleomargarine.

Formula 3.—high grade.

	Pounds.
Oleo oil	100
Neutral lard	130
Butter	95
Salt	32
Color	½
Total	357½

will produce about 352 pounds of oleomargarine.

"Practically all the oleomargarine manufactured in the United States is made by the simple process of churning a melted mixture of oleo oil and neutral lard with milk, cream, or melted butter to give it the butter flavor, and coloring matter to give it any desired shade of yellow in semblance of butter. In the cheap grades cotton-seed oil is often substituted for a portion of oleo oil and neutral lard, but never to the total exclusion of either. After the churning process the whole is salted and put upon the market in a variety of forms [in respect to shape, packing, etc.], as demanded by the various classes of consumers."

Turning to the records in these cases, what evidence do we find upon the cost of the article and the relative price of butter and oleomargarine in the Chicago market? As the evidence upon this point is practically the same in the *Cliff*, *Schick*, and *Broadwell* cases, it will be sufficient to refer to the evidence in the *Cliff* case.

Dadie, the secretary of the Moxley Company (the company which made the oleomargarine in three cases just named), testified (Cliff R., p. 19) that he knows the company can not make and sell the colored article in competition with butter and pay the 10-cent tax. He says that in December last butter sold for 29 cents per pound, but that was an extremely high price. He said in view of that fact his company was able to manufacture and sell the colored article at 24 cents per pound, 5 cents below the price of butter. This doubtless was at a fair profit to the manufacturer. He further states that the average price for butter the year around is approximately 25 cents per pound. On page 20 he states that in January of the present year they were selling the uncolored oleomargarine at 12½ cents per pound, and, it is to be presumed, at a fair profit.

On cross-examination, Izard, a restaurant keeper and a witness for the dealers, testified (R., p. 18) that he could not now get good butter cheaper than he could get colored oleomargarine; that good butter cost on an average about 2 cents more per pound

than colored oleomargarine. In view of the testimony of the dealers' own witnesses respecting the relative cost of butter and of oleomargarine, and of the facts contained in the Census Report quoted from, it can not be contended, with any force or reality, that the tax is prohibitive of the sale of the counterfeit article. An analysis of Dadie's testimony (*ut supra*) shows by the clearest inferences that the tax has simply caused a readjustment of demand and markets; that the oleomargarine business is not destroyed; and that already, after the check caused by the tax, the industry and trade in the uncolored article are being reestablished and are growing. It may be true that the articles used in the manufacture of oleomargarine have increased in cost; but so has butter correspondingly, so that the relative cost appears to remain the same.

It is claimed that the tax is prohibitive because the quantity of the colored article sold since the taking effect of the present law has fallen off so that but comparatively small quantities have been sold. That does not prove the claim. The testimony of the witnesses for the dealers is that good butter costs on an average 2 cents more per pound than colored oleomargarine.

This fact alone shows a normal margin of profit and a sufficient field for oleomargarine in competition with butter, even under the present tax. Now, why is it that, since oleomargarine is claimed to be at least as sweet, pure, and wholesome as

butter, and can be sold under present conditions in competition with butter, the people who are said to wish it, or even prefer it, are not now willing to buy it at 2 cents per pound less than butter, when they were willing, as claimed, under the 2-cent tax, to pay butter prices for it? This seems rather strange, and yet is what the dealers' claim and testimony reduces to. Is the apparent dilemma explained by regarding the distinction between the small dealers or users (like hotel people) on the one hand and the actual *consumer* on the other? The latter probably seldom knew what he was buying and eating, and it may be that one effect of this act is to protect him, to enable him to know more certainly what he is buying, and in that way affect the undue profits and, in consequence, the market demand.

The witness Dadie says (Schick Rec., p. 17, 18) that the uncolored article put out by them is now sold to the poorer people and, so far as he can ascertain, it is displacing lard and is used for cooking purposes. He further says (p. 18) that lard was selling for 10¼ cents per pound and uncolored oleomargarine at 12½ cents, and that the people were buying the latter for cooking in preference to lard. It is strange that people will pay more for this superior article for cooking purposes than for lard, and yet while formerly preferring it to butter and paying butter prices, they will not purchase it now although it can be had at a less price than butter.

What effect did the law have upon the production of oleomargarine? For the year ending June 30, 1902, the total production of oleomargarine was 123,133,853 pounds. For the year ending June 30, 1903 (under the present law), the total production amounted to 71,237,438 pounds. Of this amount 5,112 pounds paid the tax under the old law at 2 cents per pound; 2,719,422 pounds (colored) paid the tax of 10 cents; 68,490,992 pounds paid the tax of one-fourth cent, and 21,915 pounds (imported) paid the tax of 15 cents. This information is taken from the reports of the Commissioner of Internal Revenue for these years. It is true that there is a large falling off in production. A part of the loss may properly be attributable to the time required to adjust matters to new conditions.

The following table shows the number of pounds produced during the months of July, August, and September of the present year, as appears from the records in the office of the Commissioner of Internal Revenue:

1903.	Uncolored.	Colored.
July	3,268,805	284,828
August	3,502,618	285,581
September	4,268,993	281,053
Total	11,040,416	851,462

Although this information was furnished informally, there can be no valid objection to its relevancy or accuracy.

Can it be said, with any degree of certainty, what per cent of this loss was a loss of legitimate trade and business? It must be remembered that prior to the change in the tax practically all oleomargarine was colored yellow. (Dadie, Cliff R., p. 17.) Now, in view of the fact that at the time of the passage of this law about thirty of the States had absolutely prohibited the manufacture and sale of oleomargarine colored in imitation of butter; the fact that nearly all of the remaining States had stringent laws requiring the branding of both the colored and the uncolored article; the fact (as shown by the decisions of the courts of the several States and the reports of the officers charged with the enforcement of State laws) that great frauds were being perpetrated in selling the colored product as and for butter; and the further fact that by the passage of this law and the promulgation of the regulations thereunder, it became exceedingly difficult to continue these frauds without detection, is it not a reasonable presumption that the falling off in production, the alleged injury to the business, is indicative of the amount of the colored article that theretofore had been fraudulently sold as and for butter? If the effect of this law be to put a stop to the practice of these frauds, can offending parties for that reason alone come into this court and be heard to complain? I do not say defendants have so offended, but the business in general has been long open to suspicion. And if offenders can not complain that

the fraudulent side of the business has been checked as one of the results of the tax, what right granted by the Constitution of the United States has been impaired? The right to practice a fraud upon one's fellow men! Very likely innocent manufacturers and dealers suffer. But this court said in the *Plumley case* that "the Constitution of the United States does not secure to anyone the privilege of defrauding the public." Is it too much to add that the Constitution does not secure the opportunity to defraud nor intend to leave an open door to fraud which he may enter who is so inclined? I venture to say that in the end the honest side of the trade, in its proper development, will approve the effect of this law as limiting the opportunities for fraud, in harmony with and not counter to the great current of State policy and legislation.

These cases arose in the States of Illinois and Ohio. What rights, privileges, or immunities guaranteed by those States have been infringed? None whatever. On the contrary, the acts of these parties were, at the time of their commission, made criminal by the laws of the States in which they were committed. The act of Illinois of June 14, 1897, in force at the time of the commission of the offenses here involved, reads as follows:

> Every article made from other than pure milk or cream is declared to be imitation butter.

No person shall coat, powder, or color with annatto, or any coloring matter whatever, any substance designed as a substitute for butter, whereby such substitute or product so colored or compounded shall be made to resemble butter, or the product of the dairy.

No person shall combine any animal fat or vegetable oil or other substance with butter or combined therewith or with animal fat or vegetable oil, or combination of the two, or with either one, any other substance or substances for the purpose or with the effect of imparting thereto a yellow color or any shade of yellow so that such substitute shall resemble yellow, or any shade of genuine yellow butter, nor introduce any such coloring matter or such substance or substances into any of the articles of which the same is composed. (Laws of 1897, p. 3.)

The act further makes it unlawful to produce or manufacture, or sell, prepare for sale, or offer for sale, any imitation butter made in violation of the act, whether produced in the State or not, and imposes a heavy penalty for any violation thereof.

The Ohio law, in force since 1894, provides as follows:

No person shall manufacture, offer or expose for sale, sell or deliver, or have in his possession with intent to sell or deliver, any oleomargarine which contains any methyl orange, butter yellow, annatto, analine dye, or any other coloring matter. (Act of May 16, 1894; 91 Ohio Laws, 274.)

In *State ex rel.* v. *Capital City Dairy Co.* (62 Ohio St., 350), arising under the State law just quoted, practically the same complaint was made by an oleomargarine manufacturer that is made here—the denial of an alleged natural right to manufacture the article and to sell it in such form as it chose.

The proceeding was one in *quo warranto* to revoke the charter of the corporation for the repeated violation of the law above quoted. The court, after saying (p. 359) that the evidence compelled the conclusion that the acts charged had been committed by the defendant, and that their frequency warranted the conclusion that they were committed willfully and with the intent to disregard the statute and to defy the officers whose duty it was to enforce the law, held that the law did not violate any right granted to the manufacturer by the constitution of that State; further stating that the difference between the price at which butter may be manufactured and sold and that at which oleomargarine may be afforded, is so large that the temptation to impose upon the public is too great to be resisted; and that, therefore, because of the manufacture of the article in a way calculated to deceive and to impose a fraud upon the public, the State had the right to pass the law in question. So there is nothing in their claim that, in imposing this tax, Congress is denying or interfering with a right granted them by the constitutions and laws of their respective

States. *The Capital City Dairy* case reached this court, and the decision of the supreme court of Ohio was sustained (183 U. S., 238).

In other words, since we have entered upon the underlying considerations, and frankly discussed the collateral effect of this tax as imposing a restriction, but not an undue restriction, upon business, it is proper to say, and it is manifest, that on the side of alleged interference with State powers, the Federal act is not in conflict, but on the other hand operates, so far as it operates outside the revenue field, to reinforce and support the trend of State legislation.

To return to the question whether the tax is prohibitive—if there be a legitimate demand for the colored article as and for what it really is, does the mere fact that the tax imposed requires the article to be sold at a price equal to that at which butter is sold, render the tax prohibitive? Will not the public generally, if they desire the article, pay the price asked for it, especially when the increase in price from the price under the former law is so trifling? To say that the public will not do this is to concede that the article can not stand upon its merits, but must be sold, and fraudulently sold, in the disguise of and as and for butter.

For, when there is a real public demand for an article, uncontrolled by inducements and irrespective of guises and pretense, the public will have it, and the question of cost or tax cuts but little figure.

Thus it costs but a few cents per gallon to manufacture whisky. Upon that article the Government imposes a tax of $1.10 per gallon; but because of that fact does the tax render its manufacture prohibitive? Certainly not. On the contrary there is a strong demand for it, because the public demands whisky. So, too, with tobacco; Congress in the act of 1898 increased the tax from 6 to 12 cents per pound, but the demand for it did not diminish. So with beer, and many other articles. We import many articles, upon which heavy duties are imposed, which we manufacture at a less cost than the imported article can be sold for; but while that may check the sale of the article, it does not thereby cause the duty to be regarded as prohibitive. Some of the compound taxes on foreign imports amount to 100 per cent or more.

(5) **Further on the validity of the classification; proper substitutes, and improper imitations.**

An article may be used as a substitute for another without being made so closely in imitation of it that it is not possible to tell the original from the substitute. And what is the purpose of the close imitation? The natural inference is that the intention is to dispose of it as being that which it seeks to imitate. And, as a matter of fact, is it not the purpose in coloring oleomargarine to make it so closely resemble butter that it may be sold as and for butter? This fact is so fully within common knowledge that the court may properly take

judicial notice of it. In considering State laws, the court has already done so. Will the claim put forth that the public demands the colored article and will not use the uncolored bear examination? Can that possibly be true of the vast majority of actual consumers?

A good illustration of the difference between a substitute for an article and an imitation of it exists with respect to coffee. There is upon the market to-day a substitute for coffee, made of cereals, put up in a distinctive form, which, when prepared, looks like and tastes like coffee. This article is sold upon its merits, and irrespective of the price for which the real coffee is sold. To the extent that its use diminishes the use of the real coffee it may be said to come in competition with it. While it is a substitute for, it can not strictly be said that it is an imitation of coffee. No one can be deceived into buying it for coffee.

There is also upon the market to-day an imitation coffee, made of parched peas, chicory, beans, molasses, and a few other kindred products. This composition is ground, mixed, and pressed into molds, so that when it reappears it comes forth in the semblance of and is a good counterfeit of the real coffee berry. That is an imitation coffee. The result, if not the purpose, of imitating the berry of the real article is obviously the same as in coloring oleomargarine—it may deceive the public—or, as was said by Mr. Justice Harlan in

Plumley v. *Massachusetts*, it may *cheat* the general public into purchasing that which they may not intend to buy.

Now suppose that Congress should pass a law imposing a tax of 10 cents per pound upon such "coffee" when made in imitation of the real berry, and one-fourth cent per pound when made in the form of a round berry; and suppose the law were contested on the ground that the tax of 10 cents was prohibitive; and the manufacturer were to claim he could not sell the coffee in the round berry because the public demanded the coffee in the form of the real article, saying to him, "take back your parched peas, we will not have them" (as in the Cliff case, Rec., p. 14); "we are willing to pay coffee prices for the article when put up in the form of the real article, but otherwise we will not use it." Would that claim be believed; or is there a sentimental difference because butter or oleomargarine appears on the table and coffee or its imitation is ground up to make an indistinguishable liquid? So we say, that if colored oleomargarine has the peculiar standing as a legitimate article of commerce, which is claimed for it by the dealers, the mere fact of the imposition of the tax would only reduce, in slight degree, the demand for the article.

On the other hand, does not the fact that the present law and the regulations under it make it next to impossible to continue the business on its

counterfeiting and illegitimate side, furnish us the true solution of the reason for the falling off in the sales of colored oleomargarine? If one of the incidents and effects of the law be to check fraud, I am confident this court will not be diligent to find reasons antagonistic to its well-settled judgments for sustaining the complaint that the law is void.

Counsel for *McCray* attempts to show (brief, p. 12) that this tax was not a revenue measure, because at the time the tax was changed we had an overflowing treasury and Congress was then engaged in reducing the war taxes. It is true that Congress was taking the burdens off of a great number of articles and readjusting taxes, having due regard for the general welfare of the people. But the tax upon oleomargarine was imposed in 1886, and was not therefore a war-revenue tax. And further, Congress did reduce the tax upon oleomargarine from 2 cents to one-fourth cent per pound when put up in such form as to show its true character; but having regard to the great profits then made in selling colored oleomargarine, it shifted the burden of the tax to that form of the article and increased it. This Congress, applying its judgment and discretion to the whole field and the different elements involved, had a perfect right to do. The law was none the less a revenue measure because of the extent of the field and the bearing of the various elements included.

(6) The oleomargarine involved in each of these cases was artificially colored within the meaning of section 8.

Section 8, as amended May 9, 1902, after laying a tax of 10 cents per pound upon oleomargarine, limited the operation of this tax by providing:

> When oleomargarine *is free from artificial coloration* that causes it to look like butter of any shade of yellow, said tax shall be one-fourth of one cent per pound.

The question here to be determined is, What constitutes an artificial coloration of oleomargarine within the meaning of this proviso?

In the *Schick* and *Broadwell* cases it is conceded by the witnesses for the dealers that the oleomargarine, which formed the basis of the prosecutions in those cases, was artificially colored by the use of the Wells-Richardson Improved Butter Color, and hence those cases may be dismissed from further discussion under this proposition.

In the *McCray* case the coloring was imparted by using butter which had been colored with the Wells-Richardson Butter Color.

In the *Cliff* case the coloring was produced through the use of palm oil in the manufacture of the oleomargarine.

Now, it is contended in the *McCray* case that the use of butter, artificially colored, in the manufacture of the oleomargarine, did not constitute an artificial coloration within the meaning of the statute. This contention barely merits notice.

The Government concedes that the manufacturer may use any healthful ingredient which in itself is of a yellow color, if it can be used as an ingredient in appreciable quantity, and that such use of an ingredient does not constitute an artificial coloration within the meaning of the statute; but the Government denies that a manufacturer may use an article in so minute a quantity as to constitute no material part of the article when the direct effect of the use of such ingredient is artificially to color the oleomargarine a shade of yellow. That can not be done indirectly which can not be done directly. It is asserted (in the McCray brief, pp. 30–35) that a person may use artificially colored butter in the manufacture of oleomargarine and not subject the article to the 10-cent tax. The contention is that since section 2 of the act of 1886, in defining what shall constitute oleomargarine, includes butter when mixed with other substances, that thereby Congress has recognized butter as a proper ingredient of oleomargarine, and since by section 1 of that act Congress defined butter to be the food product usually known as butter, made exclusively from milk or cream, with or without salt and with or without additional coloring matter, that thereby any butter, whether artificially colored or not, may be used in the manufacture of oleomargarine, and the color thereby introduced does not constitute artificial coloration within the meaning of the statute.

Now to the logician this may be a specious argument; but the difficulty is that after the logical excursion he lands at his starting point. If all butter were, under the definition contained in section 1, *required* to be artificially colored, there might be some force in his argument. But Congress therein recognizes two kinds of butter—the colored and the uncolored; and so, in order to escape the 10-cent tax, oleomargarine manufacturers must use the uncolored variety of butter. Even if all butter were artificially colored, the necessary effect of the law would be that all oleomargarine containing butter would be subject to the 10-cent tax. To exempt the oleomargarine from the 10-cent tax *it must be free from artificial coloration;* that is, at no stage of the manufacture can artificial coloration be introduced into compound, whether directly or indirectly or by means of the use of butter containing the artificial coloring matter. The fact that the color was introduced through the use of artificially colored butter makes it none the less artificial coloration, and requires the payment of tax accordingly.

Nor does the amendment to section 2 made by the act of May 9, 1902, change this conclusion. That amendment provides:

> And any person that sells, vends, or furnished oleomargarine for the use and consumption of others, except to his own family table without compensation, who shall add to or mix with such oleomargarine any

> artificial coloration, * * * shall also be held to be a manufacturer of oleomargarine, etc.

The only purpose of this provision was to prevent the coloration of the article after it left the factory. But for this provision there would have been nothing to prevent the coloration of the product after that point of time. The manufacturers, in order to escape the tax of 10 cents, could have shipped to the dealers, wholesale and retail, the article in its uncolored state, leaving it to them to do the coloring. If that loophole had been left open, obvious additional requirements of inspection to prevent fraud and evasion would have been called for.

(7) As to coloration by means of palm oil.

In the *Cliff* case the coloration was produced by using palm oil (Rec., p. 10). The formula used in the manufacture of the article sold, as testified by the foreman of the factory at which it was made, is as follows:

> Three pounds of oleo oil; 1 pound and 12 ounces of neutral lard; 2 pounds of cotton-seed oil; 1 pound and 14½ ounces of milk; 1 pound and 4 ounces of salt; and 1½ ounces of palm oil; a total of 10 pounds.

The court will observe that of the 160 ounces required to make up the proportions of the formula, but 1½ ounces was palm oil, less than 1 per cent of the entire amount.

What is palm oil, and what was the purpose of its use in this formula? For a full description of its properties and uses we refer the court to Lewkowitsch's "Chemical Analysis of Oils, Fats, and Waxes" (2d ed.), page 517, and to Allen's "Chemical Organic Analysis," vol. 2, part 1 (3d ed.), page 161, both standard works on chemistry.

These chemists (authors) say that palm oil is the product, mainly, of the fruit of two species of palm trees; that in color it varies greatly, ranging through all shades from orange yellow to dark dirty red; in consistency, from soft lard to that of hardest tallow; that when fresh it has a somewhat sweetish taste, but on becoming older it has a rancid and a more or less disagreeable smell; in its fresh state the proportion of fatty acids, calculated as palmitic acid, amounts to 12 per cent, and may in older samples reach 100 per cent; frequently it contains from 50 to 70 per cent of free palmitic acid, and that it is chiefly used in the manufacture of soap, candles, and axle grease.

Moxley, the manufacturer of this oleomargarine, in June, 1902, submitted to the Commissioner of Internal Revenue, for analysis, a sample of *crude palm oil*. After examination and analysis the Commissioner (Rec., p. 9) replied that "the oil was rancid, of bad taste and smell, and that it was considered by this office wholly unfit for use in oleomargarine." Thereupon Moxley submitted a sample of what he termed "refined palm oil." As

to this sample, the Commissioner, after stating that it had been examined and chemically analyzed, says:

> It was found to contain a large amount of free fatty acid; it was by no means free from disagreeable odor and taste, and was of a very deep red or orange color. If oil like the sample were used in any considerable quantity as one of the fatty ingredients, it would undoubtedly cause a condition under which this office would rule that the oleomargarine contained an ingredient deleterious to public health and offensive in taste and odor.

And the Commissioner then continues:

> After this second sample had been submitted and the matter was under advisement in this office, fullest opportunity was given for hearing and oral argument by you and others interested upon the subject of the use of palm oil in the manufacture of oleomargarine. As a result of the examination made of the samples of oil submitted, *it was virtually agreed at the hearing that palm oil* of the grade of the samples examined *could not be introduced* into the manufacture of oleomargarine in considerable quantities as oleo oil, neutral oil, cottonseed oil, butter, or milk is now introduced, *but only in quite small quantities or proportions.* It was further found by examination in this office that, take any given quantity of unartificially colored oleomargarine—the

same being virtually white in appearance—if three-tenths of 1 per cent of the palm oil submitted was introduced therein it would give to the finished product a shade of yellow, and that the finished product would in appearance be in imitation or semblance of butter. In other words, that if to the finished sum total of uncolored oleomargarine in weight 1,500 pounds there was added a little less than 5 pounds of this palm oil, the result would be a marked change in color, there being secured through the introduction of the palm oil to the finished product a shade of yellow, causing the finished product to look like butter.

And this is the conclusion of the Commissioner:

> This office rules that where so minute and infinitesimal a quantity of a vegetable oil is used in the manufacture of oleomargarine as is proposed to be used of palm oil, and through its use the finished product looks like butter of any shade of yellow, it can not be considered that the oil is used with the purpose or intention of being a *bona fide* constituent part or element of the product, but is used *solely* for the purpose of producing or imparting a yellow color to the oleomargarine, and, therefore, that the oleomargarine so colored is not free from artificial coloration and becomes subject to the tax of 10 cents per pound.

There can be no doubt that the use of palm oil is for artificial coloration. Indeed, any other use would make the product unfit for consumption.

Cliff's witnesses testified as follows upon this point: Hoskins, a chemist, says (Rec., p. 11) that he is familiar with the chemical properties of palm oil; that "it is an edible oil;" and in his opinion "there is nothing deleterious or unwholesome in the use of palm oil, *in the proportion in which it is used in this formula*. That language implies that if it had been used in larger quantities it would have been deleterious to health, as stated by the Commissioner, which is the fact.

On cross-examination he says that a very small proportion of palm oil is necessary to produce a *desirable* color in oleomargarine; that in color it is a reddish yellow.

It plainly appears from the testimony, and by reference to the chemical works cited, that but minute quantities of the oil can be used in the manufacture of oleomargarine; if an appreciable quantity were used, the product would become a dirty red, having no resemblance to butter, and therefore undesirable; if bleached by exposure to air, while losing its color, it will still retain its odor and its large percentage of acids, and becomes rancid, and therefore disagreeable and deleterious; if bleached chemically, it loses both odor and color, and is therefore undesirable for the manufacturer who is seeking the color properties.

The record contains testimony with respect to the use by Moxley of color prior to the taking effect of the present law. On page 20 of the *Cliff* record, his secretary, Dadie, testifies that prior to

July 1, 1902, they used only the Wells-Richardson butter color; since then they have used some of that color *and also some palm oil.* It seems that the manufacturer discovered that palm oil was a wholesome and desirable *ingredient* for use in making oleomargarine immediately after the new law went into effect.

It may be well to repeat here the formulas used in manufacturing the oleomargarine involved in each of these cases:

McCray case: Oleo oil, 20 pounds; neutral lard, 30 pounds; creamery butter 50 pounds; milk and cream, 30 pounds; salt, 7 pounds—137 pounds.

No coloring matter is given for the reason that the butter used contained artificial coloring.

Schick case: Oleo oil, 40 ounces; neutral lard, 71¾ ounces; cream, 28 ounces; salt, 20 ounces; butter color, one-fourth ounce.

Broadwell case: Oleo oil, 40 ounces; neutral lard, 71¾ ounces; cream, 28 ounces; salt, 20 ounces; butter color, one-fourth ounce.

Cliff case: Oleo oil, 48 ounces; neutral lard, 28 ounces; cotton-seed oil, 32 ounces; milk, 30½ ounces; salt, 20 ounces; *palm oil,* 1½ *ounces.*

Looking at the relative quantities of the different ingredients named in these formulas, to which class would an observant person say palm oil belonged—to the butter fats or to the coloring elements? To put this question is to answer it. The

fact that palm oil is a vegetable oil makes it none the less a vegetable coloring matter. If a wholesome vegetable fat, which the evidence shows it is not, it would not be used in such minute quantities. No one will deny the fact that the more cream or butter used in the manufacture of oleomargarine, the better its quality; it is the one indispensable ingredient in its manufacture, imparting the flavor and the odor, exclusively adding the butyrin elements, which no other fat and no product of manufacturing chemistry can imitate, without which no one would dream of using oleomargarine as a butter; for with all his skill, the chemist can not yet compete with the delicate chemistry of the cow.

(8) May the plaintiffs in error attack the validity of the provision of section 14 conferring finality of decision upon the Commissioner of Internal Revenue?

The Government suggests the point that plaintiffs in error are not in a position to question the validity of the provision of section 14 conferring upon the Commissioner of Internal Revenue the power finally to decide what mixtures are subject to tax under the act.

Certainly *Schick* and *Broadwell* can not, for by the testimony of their own witnesses it is conceded the Wells-Richardson artificial coloration was used. How can they be heard to deny the validity of the power to decide a disputed point when it was not exercised against them?

Is *McCray* in any better position? He admits in his answer that his product contained the Wells-Richardson artifical coloration, but says that because it was introduced through the use of butter containing the coloration it was not *artificial* coloration. Having admitted the coloration was there, it matters not how it came there; his product was not free from artificial coloration.

And in the *Cliff* case, even conceding for argument's sake the invalidity of that provision, it will not avail *Cliff*, for by the testimony of his witnesses the court must hold that the palm oil was introduced for purposes of coloration and not for its fat, and that therefore the article was artificially colored.

(9) The trial court rightfully excluded the testimony for the defendants.

If the court shall hold the law attacked to be valid, then the question whether the trial court properly or improperly excluded the testimony offered on behalf of the defendants, to the exclusion of which exceptions were taken, becomes immaterial. For this reason a discussion of these assignments of error is not deemed necessary.

The Government respectfully submits that the law is valid in all respects and that the judgments in each of these cases should be affirmed.

HENRY M. HOYT,
Solicitor-General.

APPENDIX A.

(Act of August 2, 1886, 24 Stat. 209, as amended by act of May 9, 1902, 32 Stat., 193, the amendments made by latter act being printed in black type.)

Chapter 840. An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purposes of this act the word "butter" shall be understood to mean the food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter.

SEC. 2. That for the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as "oleomargarine," namely: All substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef fat, suet, lard, lard oil, vegetable-oil annotto, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance

of butter, or when so made, calculated or intended to be sold as butter or for butter.

SEC. 3. That special taxes are imposed as follows:

Manufacturers of oleomargarine shall pay six hundred dollars. Every person who manufactures oleomargarine for sale shall be deemed a manufacturer of oleomargarine.

And any person that sells, vends, or furnishes oleomargarine for the use and consumption of others, except to his own family table without compensation, who shall add to or mix with such oleomargarine any artificial coloration that causes it to look like butter of any shade of yellow, shall also be held to be a manufacturer of oleomargarine within the meaning of said act, and subject to the provisions thereof.

Wholesale dealers in oleomargarine shall pay four hundred and eighty dollars. Every person who sells or offers for sale oleomargarine in the original manufacturer's packages shall be deemed a wholesale dealer in oleomargarine. But any manufacturer of oleomargarine who has given the required bond and paid the required special tax, and who sells only oleomargarine of his own production, at the place of manufacture, in the original packages to which the tax-paid stamps are affixed, shall not be required to pay the special tax of a wholesale dealer in oleomargarine on account of such sales.

Retail dealers in oleomargarine shall pay forty-eight dollars. Every person who sells oleomargarine in less quantities than ten pounds at one time shall be regarded as a retail dealer in oleomargarine. And sections thirty-two hundred and thirty-two, thirty-two hundred and thirty-three, thirty-two hundred and thirty-four, thirty-two hundred

and thirty-five, thirty-two hundred and thirty-six, thirty-two hundred and thirty-seven, thirty-two hundred and thirty-eight, thirty-two hundred and thirty-nine, thirty-two hundred and forty, thirty-two hundred and forty-one, and thirty-two hundred and forty-three of the Revised Statutes of the United States are, so far as applicable, made to extend to and include and apply to the special taxes imposed by this section, and to the persons upon whom they are imposed: *Provided*, That in case any manufacturer of oleomargarine commences business subsequent to the thirtieth day of June in any year, the special tax shall be reckoned from the first day of July in that year, and shall be five hundred dollars.

Provided further, That wholesale dealers who vend no other oleomargarine or butterine except that upon which a tax of one-fourth of one per cent per pound is imposed by this act, as amended, shall pay two hundred dollars; and such retail dealers as vend no other oleomargarine or butterine except that upon which is imposed by this act, as amended, a tax of one-fourth of one cent per pound shall pay six dollars.

SEC. 4. That every person who carries on the business of a manufacturer of oleomargarine without having paid the special tax therefor, as required by law, shall, besides being liable to the payment of the tax, be fined not less than one thousand and not more than five thousand dollars; and every person who carries on the business of a wholesale dealer in oleomargarine without having paid the special tax therefor, as required by law, shall, besides being liable to the payment of the tax, be fined not less than five hundred nor more than two thousand dollars; and every person who

carries on the business of a retail dealer in oleomargarine without having paid the special tax therefor, as required by law, shall, besides being liable to the payment of the tax, be fined not less than fifty nor more than five hundred dollars for each and every offense.

SEC. 5. That every manufacturer of oleomargarine shall file with the collector of internal revenue of the district in which his manufactory is located such notices, inventories, and bonds; shall keep such books and render such returns of material and products; shall put up such signs and affix such number to his factory, and conduct his business under such surveillance of officers and agents as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may, by regulation, require. But the bond required of such manufacturer shall be with sureties satisfactory to the collector of internal revenue, and in a penal sum of not less than five thousand dollars; and the sum of said bond may be increased from time to time, and additional sureties required at the discretion of the collector, or under instructions of the Commissioner of Internal Revenue.

SEC. 6. That all oleomargarine shall be packed by the manufacturer thereof in firkins, tubs, or other wooden packages not before used for that purpose, each containing not less than ten pounds, and marked, stamped, and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe; and all sales made by manufacturers of oleomargarine, and wholesale dealers in oleomargarine shall be in original stamped packages. Retail

dealers in oleomargarine must sell only from original stamped packages, in quantities not exceeding ten pounds, and shall pack the oleomargarine sold by them in suitable wooden or paper packages, which shall be marked and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe. Every person who knowingly sells or offers for sale, or delivers or offers to deliver, any oleomargarine in any other form than in new wooden or paper packages as above described, or who packs in any package any oleomargarine in any manner contrary to law, or who falsely brands any package or affixes a stamp on any package denoting a less amount of tax than that required by law, shall be fined for each offence not more than one thousand dollars, and be imprisoned not more than two years.

SEC. 7. That every manufacturer of oleomargarine shall securely affix, by pasting, on each package containing oleomargarine manufactured by him a label on which shall be printed, besides the number of the manufactory and the district and State in which it is situated, these words: "Notice.—The manufacturer of the oleomargarine herein contained has complied with all the requirements of law. Every person is cautioned not to use either this package again or the stamp thereon again, nor to remove the contents of this package without destroying said stamp, under the penalty provided by law in such cases." Every manufacturer of oleomargarine who neglects to affix such label to any package containing oleomargarine made by him, or sold or offered for sale by or for him, and every person who removes any such

label so affixed from any such package, shall be fined fifty dollars for each package in respect to which such offense is committed.

Sec. 8. That upon oleomargarine which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected a tax of ten cents per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound: Provided, when oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow, said tax shall be one-fourth of one cent per pound.

The tax levied by this section shall be represented by coupon stamps; and the provisions of existing laws governing the engraving, issue, sale, accountability, effacement, and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section.

SEC. 9. That whenever any manufacturer of oleomargarine sells, or removes for sale or consumption, any oleomargarine upon which the tax is required to be paid by stamps, without the use of the proper stamps, it shall be the duty of the Commissioner of Internal Revenue, within a period of not more than two years after such sale or removal, upon satisfactory proof, to estimate the amount of tax which has been omitted to be paid, and to make an assessment therefor and certify the same to the collector. The tax so assessed shall be in addition to the penalties imposed by law for such sale or removal.

SEC. 10. That all oleomargarine imported from foreign countries shall, in addition to any import duty imposed on the same, pay an internal-revenue

tax of fifteen cents per pound, such tax to be represented by coupon stamps, as in the case of oleomargarine manufactered in the United States. The stamps shall be affixed and canceled by the owner or importer of the oleomargarine while it is in the custody of the proper custom-house officers; and the oleomargarine shall not pass out of the custody of said officers until the stamps have been so affixed and canceled, but shall be put up in wooden packages, each containing not less than ten pounds, as prescribed in this act for oleomargarine manufactured in the United States, before the stamps are affixed; and the owner or importer of such oleomargarine shall be liable to all the penal provisions of this act prescribed for manufacturers of oleomargarine manufactured in the United States. Whenever it is necessary to take any oleomargarine so imported to any place other than the public stores of the United States for the purpose of affixing and canceling such stamps, the collector of customs of the port where such oleomargarine is entered shall designate a bonded warehouse to which it shall be taken, under the control of such customs officer as such collector may direct; and every officer of customs who permits any such oleomargarine to pass out of his custody or control without compliance by the owner or importer thereof with the provisions of this section relating thereto, shall be guilty of a misdemeanor, and shall be fined not less than one thousand dollars nor more than five thousand dollars, and imprisoned not less than six months nor more than three years. Every person who sells or offers for sale any imported oleomargarine, or oleomargarine

purporting or claimed to have been imported, not put up in packages and stamped as provided by this act, shall be fined not less than five hundred dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than two years.

SEC. 11. That every person who knowingly purchases or receives for sale any oleomargarine which has not been branded or stamped according to law shall be liable to a penalty of fifty dollars for each such offense.

SEC. 12. That every person who knowingly purchases or receives for sale any oleomargarine from any manufacturer who has not paid the special tax shall be liable for each offense to a penalty of one hundred dollars, and to a forfeiture of all articles so purchased or received, or of the full value thereof.

SEC. 13. That whenever any stamped package containing oleomargarine is emptied, it shall be the duty of the person in whose hands the same is to destroy utterly the stamps thereon; and any person who willfully neglects or refuses so to do shall for each such offense be fined not exceeding fifty dollars and imprisoned not less than ten days nor more than six months. And any person who fraudulently gives away or accepts from another, or who sells, buys, or uses for packing oleomargarine, any such stamped package, shall for each such offense be fined not exceeding one hundred dollars and be imprisoned not more than one year. Any revenue officer may destroy any emptied oleomargarine package upon which the tax-paid stamp is found.

SEC. 14. That there shall be in the office of the Commissioner of Internal Revenue an analytical chemist and a microscopist, who shall each be appointed by the Secretary of the Treasury, and shall each receive a salary of two thousand five hundred dollars per annum; and the Commissioner of Internal Revenue may, whenever in his judgment the necessities of the service so require, employ chemists and microscopists, to be paid such compensation as he may deem proper, not exceeding in the aggregate any appropriation made for that purpose. And such Commissioner is authorized to decide what substances, extracts, mixtures, or compounds which may be submitted for his inspection in contested cases, are to be taxed under this act; and his decision in matters of taxation under this act shall be final. The Commissioner may also decide whether any substance made in imitation or semblance of butter, and intended for human consumption, contains ingredients deleterious to the public health; but in case of doubt or contest his decisions in this class of cases may be appealed from to a board hereby constituted for the purpose, and composed of the Surgeon-General of the Army, the Surgeon-General of the Navy, and the Commissioner of Agriculture; and the decisions of this board shall be final in the premises.

SEC. 15. That all packages of oleomargarine subject to tax under this act that shall be found without stamps or marks as herein provided, and all oleomargarine intended for human consumption which contains ingredients adjudged, as hereinbefore provided, to be deleterious to the public health, shall be forfeited to the United States.

Any person who shall willfully remove or deface the stamps, marks, or brands on package containing oleomargarine taxed as provided herein shall be guilty of a misdemeanor, and shall be punished by a fine of not less than one hundred dollars nor more than two thousand dollars, and by imprisonment for not less than thirty days nor more than six months.

SEC. 16. That oleomargarine may be removed from the place of manufacture for export to a foreign country without payment of tax or affixing stamps thereto, under such regulations and the filing of such bonds and other security as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe. Every person who shall export oleomargarine shall brand upon every tub, firkin, or other package containing such article the word "oleomargarine," in plain Roman letters not less than one-half inch square.

SEC. 17. That whenever any person engaged in carrying on the business of manufacturing oleomargarine defrauds, or attempts to defraud, the United States of the tax on the oleomargarine produced by him, or any part thereof, he shall forfeit the factory and manufacturing apparatus used by him, and all oleomargarine and all raw material for the production of oleomargarine found in the factory and on the factory premises, and shall be fined not less than five hundred dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than three years.

SEC. 18. That if any manufacturer of oleomargarine, any dealer therein or any importer or ex-

porter thereof shall knowingly or willfully omit, neglect, or refuse to do, or cause to be done, any of the things required by law in the carrying on or conducting of his business, or shall do anything by this act prohibited, if there be no specific penalty or punishment imposed by any other section of this act for the neglecting, omitting, or refusing to do, or for the doing or causing to be done, the thing required or prohibited, he shall pay a penalty of one thousand dollars; and if the person so offending be the manufacturer of or a wholesale dealer in oleomargarine, all the oleomargarine owned by him, or in which he has any interest as owner, shall be forfeited to the United States.

SEC. 19. That all fines, penalties, and forfeitures imposed by this act may be recovered in any court of competent jurisdiction.

SEC. 20. That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may make all needful regulations for the carrying into effect of this act.

SEC. 21. That this act shall go into effect on the ninetieth day after its passage; and all wooden packages containing ten or more pounds of oleomargarine found on the premises of any dealer on or after the ninetieth day succeeding the date of the passage of this act shall be deemed to be taxable under section eight of this act, and shall be taxed, and shall have affixed thereto the stamps, marks, and brands required by this act or by regulations made pursuant to this act; and for the purposes of securing the affixing of the stamps, marks, and brands required by this act, the oleomargarine shall be regarded as having been manufactured and sold, or removed from the manufactory

for consumption or use, on or after the day this act takes effect; and such stock on hand at the time of the taking effect of this act may be stamped, marked, and branded under special regulations of the Commissioner of Internal Revenue, approved by the Secretary of the Treasury; and the Commissioner of Internal Revenue may authorize the holder of such packages to mark and brand the same and to affix thereto the proper tax-paid stamps.

Approved, August 2, 1886.

[Act of May 9, 1902, 32 Stat., 197.]

Sec. 6. Wholesale dealers in oleomargarine, process, renovated, or adulterated butter shall keep such books and render such returns in relation thereto as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may, by regulation, require; and such books shall be open at all times to the inspection of any internal-revenue officer or agent. And any person who willfully violates any of the provisions of this section shall for each such offense be fined not less than fifty dollars and not exceeding five hundred dollars, and imprisoned not less than thirty days nor more than six months.

APPENDIX B.

STATE AND TERRITORIAL LAWS RELATING TO OLEOMARGARINE, ADULTERATED BUTTER, RENOVATED BUTTER, AND FILLED CHEESE.

ALABAMA.

Code of 1896: Section 5326 prohibits the manufacture or sale of oleomargarine except in such manner as will advise the consumer of its real character, *free from coloration or ingredients that cause it to look like butter*, by having it stamped with its true name. It is a misdemeanor for proprietors of hotels, boarding houses, restaurants, etc., to serve to guests any composition made wholly or partly out of fat, oil, or oleaginous substance which shall be in imitation of yellow butter.

ALASKA.

General food laws: Section 156 relates to the sale of unwholesome provisions; section 157 to injurious adulterations; section 84 to trade-marks, etc. (Carter's Annotated Code, 1900, part 1, pages 18 and 33.)

(Alaska has no officer authorized to enforce its food laws.)

ARIZONA.

Sections 348 and 349, Criminal Statutes: The law of this State prescribes that every package containing oleomargarine shall be conspicuously branded with the word "oleomargarine," and

requires retail dealers of said product to deliver to each customer purchasing same a printed label bearing the word "oleomargarine," printed in type each letter of which shall not be less than one-fourth of an inch square. The law further requires that proprietors of hotels, restaurants, and other places where meals are furnished for pay, shall inform their patrons (if inquiry is made) that they use oleomargarine or imitation butter, if such be the case.

ARKANSAS.

Act of March 31, 1885: Section 1586 requires that any person who shall sell any article, substance, or compound made in imitation or semblance of butter, or a substitute for butter, and not made wholly of milk or cream, shall brand same with the words "adulterated butter;" or, if such substitute is a compound known as "oleomargarine" or "butterine," the words "oleomarine" or "butterine" shall be legibly branded or stamped thereon. A penalty is provided for violation of this section.

Section 1585 requires that keepers of hotels, inns, restaurants, and boarding houses who shall serve oleomargarine, adulterated butter, or renovated butter to guests shall have the dish in which the butter substitute is placed plainly marked with the words "oleomargarine," "butterine," or "adulterated butter," as will correctly describe the article.

CALIFORNIA.

Act approved March 4, 1897: This act permits the sale of imitation butter or imitation cheese made wholly or partly from oil, fat, or oleaginous

substance, if put up in distinct and separate form, and in such manner as will advise the consumer of their real character, *free from coloration or ingredients that cause them to look like butter* or cheese. Each package containing such products must be legibly and durably stamped or branded with the words "substitute for butter" or "substitute for cheese." It is a misdemeanor to serve to inmates of penal or charitable institutions, receiving assistance from the State, imitation products. Hotels, restaurants, etc., serving such products must inform their guests of that fact by means of a printed placard.

Act of February 23, 1899, defines renovated butter, and requires it to be put up in separate and distinct form, and each roll must be marked with the words "process butter" or "renovated butter."

CONNECTICUT.

Section 2558 provides that no person shall sell, offer, or expose for sale, or take orders for the future delivery of or have in his possession with intent to sell, any article not produced from unadulterated milk or cream, which shall be in imitation of yellow butter produced from pure unadulterated milk or cream, but does not prohibit the manufacture or sale of oleomargarine in a separate and distinct form in such manner as will advise customers of its real character *when free from coloration and from any ingredient that causes it to look like butter.*

Act approved May 18, 1895, prescribes that no imitation butter shall be sold unless there is a plain sign at the outer main entrance of the establishment bearing the words "sold here," preceded by

the name of the imitation article. All oleomargarine must be kept in packages appropriately marked with the name of contents, and the seller must orally inform each buyer that the substance is not butter, and must give the buyer the name of the imitation article. Any article resembling butter and not made wholly from the milk of cows is defined to be imitation butter.

Bakers, etc., using, in the preparation of food for sale, oleomargarine, must inform buyers thereof of the use of such product by means of a sign. Hotels, boarding houses, and restaurants serving oleomargarine to guests shall so inform them by means of a sign bearing the words "oleomargarine used here."

COLORADO.

Act approved April 1, 1895: Section 4 prohibits the manufacture and sale of oleomargarine or filled cheese except in a separate and distinct form, and in such manner as will advise the consumer of its real character, *free from coloration or ingredients that will cause it to look like cheese or yellow butter.*

DISTRICT OF COLUMBIA.

AN ACT to prevent the manufacture or sale of adulterated food or drugs in the District of Columbia, approved October 12, 1888.

This act was practically repealed by the act relating to the adulteration of foods and drugs in the District of Columbia, approved February 17, 1898.

Section 1 of the act of February 17, 1898, provides that no person or agent shall, within the District of Columbia, sell, offer for sale, or exchange any article of food which is adulterated.

Section 10 provides that nothing in this act contained shall be construed as modifying or repealing any of the provisions of "An act defining butter, imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine," approved August 2, 1886; or of "An act defining cheese, and also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of 'filled cheese,'" approved June 6, 1896.

DELAWARE.

Section 1, act approved March 9, 1901, provides that when any person exposes for sale in the State of Delaware oleomargarine, butterine, or any similar substance made in imitation or semblance of pure butter, such person shall have conspicuously placed upon the tub, package, or parcel thereof a placard containing the words "oleomargarine," "butterine," or whatever the name of the contents of the package may be, printed thereon in plain, uncondensed gothic letters not less than 1 inch long.

FLORIDA.

Revised Statutes of 1892, section 2662: The laws of Florida make it a misdemeanor to knowingly sell or cause to be sold as butter any spurious preparations purporting to be butter, whether known as "oleomargarine" or by any other name, and imposes a penalty upon hotels or boarding houses who serve to guests spurious butter without giving notice of the use of such "imitation butter."

GEORGIA.

Under the act approved December 16, 1895, it is made a misdemeanor to manufacture, sell, or offer for sale any products made in imitation

of butter or cheese, *and colored to resemble the same*, unless such products are sold as such, and the packages containing same are legibly and durably marked or branded with the word "substitute for butter," or "substitute for cheese," as the case may be. Retail dealers are required to inform their customers to whom such imitation products are sold of their true character, and in addition deliver to each said customer a printed slip stating that the same is imitation butter or imitation cheese.

Hotels, restaurants, etc., serving to guests or using in the preparation of any food imitation butter or imitation cheese must notify said guests, employees, etc., of the fact by means of a printed placard.

HAWAII.

Laws of 1897: Section 187 provides that whoever knowingly sells to any person, or offers for sale, oleomargarine or any substance purporting to be or having the semblance of butter, not made from pure cream, shall be deemed guilty of a misdemeanor and fined accordingly, unless the package containing the same is distinctly marked to indicate its contents.

IDAHO.

Act of March 9, 1903: Section 5 provides that no person shall render or manufacture, sell, offer for sale, expose for sale, or have in possession with intent to sell any substance or compound not produced directly and wholly from unadulterated milk or cream; but permits the manufacture and sale of oleomargarine in a separate and distinct form, and

in such manner as will advise the customer of its real character, *when free from coloration or ingredient which causes it to resemble butter.*

ILLINOIS.

An act approved June 14, 1897 (section 1), defines "imitation butter" as the product produced from any compound or substitute other than pure milk or cream.

Section 2 *forbids the addition of coloring matter in imitation of butter.*

Section 3 prohibits the manufacture and sale of any substance designed to be used as a substitute for butter unless the package containing the article is legibly marked "oleomargarine," "butterine," or "imitation butter."

Sections 1 and 2, act of April 24, 1901, make it unlawful to manufacture, sell, or expose for sale in the State of Illinois renovated or process butter unless the same is plainly branded "renovated butter" in a conspicuous place, to be easily read by the purchaser.

INDIANA.

Section 2181, Revised Statutes, makes it a misdemeanor to sell or expose for sale any butter other than that made from pure cream or milk without first labeling the same in large letters "oleomargarine."

Hotels, boarding houses, etc., serving oleomargarine to guests must label the product so served as "oleomargarine."

Section 1 also provides a penalty for the violation of the above provisions.

INDIAN TERRITORY.

This Territory has no legislation relative to oleomargarine, etc.

IOWA.

Section 2518 *forbids the coloring with any substance whatever* of any substance intended as a substitute for butter, *so as to cause the same to resemble butter*, or the use of any substance which will impart to the compound *the color of yellow butter*, and prohibits the sale thereof.

Section 2517 permits the manufacture of imitation butter and cheese not having a yellow color, and not artificially colored, provided each tub, firkin, box, or other package is clearly and durably branded with the words "substitute for butter," or "substitute for cheese," as the case may be. Hotels, restaurants, etc., serving imitation butter or imitation cheese, must notify their patrons of the fact by means of a printed placard.

KANSAS.

By an act approved March 2, 1889, entitled "An act to provide against the adulteration of foods or drugs," it is prohibited to manufacture or sell oleomargarine, butterine, etc., under a false name. These mixtures must be distinctly labeled as such.

KENTUCKY.

Under the law of this State oleomargarine, butterine, or kindred compounds, or mixtures of these with butter, *can not lawfully be sold if colored in imitation of butter*. Oleomargarine is permitted to be sold if put up in separate and distinct form and in such manner as to advise the consumer of its

real character, *free from coloration or ingredients that cause it to look like butter.*

Adulterated butter is defined. Process butter which has been melted and made over is classed as adulterated. Packages of such products must be branded with the name of the contents.

(See Pure Food Laws of March 17 and June 12, 1900.)

LOUISIANA.

Act approved July 8, 1886. The laws of this State prohibit the sale, handling, or giving away of oleomargarine, butterine, etc., except when so labeled as unmistakably to indicate the true composition thereof.

MAINE.

Section 3, chapter 128 (as amended March 26, 1895) makes it unlawful for any person to sell, offer for sale, expose for sale, or have in possession with intent to sell, *any substance or compound made in imitation of yellow butter*, and not made exclusively and wholly of cream or milk, whether said article or compound be named "oleomargarine, butterine," or otherwise, and imposes a heavy penalty for a violation of any provision of the section.

MARYLAND.

Article 27, Code of Public General Laws, 1900: The manufacture of any product made from oil, fat, or oleaginous substances in the imitation of butter is prohibited. Oleomargarine may be manufactured and sold in separate and distinct form, and in such manner as will advise the purchaser and the consumer of its real character, *free from coloration or ingredients which cause it to look like*

yellow butter. In the room in which oleomargarine is sold or offered for sale must be conspicuously posted a placard bearing the words "oleomargarine sold here."

Hotels, restaurants, boarding houses, hospitals, schools, and penal institutions serving oleomargarine to their guests, inmates, or help are required to orally notify such guests, inmates, or help that the substance so furnished is not butter, and shall display at all times on each and every side of the room where the product is served a legibly and durably printed sign, bearing the words "oleomargarine used here."

MASSACHUSETTS.

Chapter 56, Revised Public Statutes: Permits the sale of oleomargarine in a separate and distinct form and in such manner as will advise the consumer of its real character; *free from coloration or ingredients that cause it to look like butter*. Each package containing oleomargarine or butterine must be legibly and durably branded with the words "imitation butter," "oleomargarine," or "butterine," and in each room or place where such products are sold must be posted a placard containing the words "sold here," preceded by the name of the imitation article offered for sale. Hotels, boarding houses, etc., serving imitation butter or imitation cheese must notify their patrons of the use of such products.

Renovated butter offered for sale, or sold, must be labeled in such manner as not to be easily defaced, with the words "renovated butter." (See sections 37, 41, 44, 47, and 48.)

MICHIGAN.

Act No. 22 of the session laws of 1901: Section 1 prohibits the manufacture or sale of any article, product, or compound made wholly or partly out of fat, oil, or oleaginous substances which shall be in imitation of butter made from milk or cream, but permits the manufacture and sale of oleomargarine in separate and distinct form, and in such manner as will advise the consumer of its real character, *free from coloration or ingredient that causes it to look like yellow butter.*

Section 2 provides a penalty for the violation of the above provisions. (The constitutionality of this law has been upheld by the supreme court of Michigan in case of *People* v. *Rotter*, decided June 24, 1902.)

MINNESOTA.

By the laws of Minnesota "imitation butter" and "process or renovated butter" must be clearly and durably branded with the true name of the contents, and dealers in such products must inform purchasers of the nature of the substance sold or offered for sale. Hotels, boarding houses, etc., serving imitation butter, or process or renovated butter, must notify patrons to that effect by means of a printed placard.

It is a misdemeanor for any person or firm to manufacture or sell or offer for sale any product made wholly or partly out of fat, oil, or oleaginous substance, or compound thereof, *which shall be made in imitation or colored to resemble yellow butter* produced from milk or cream.

(See chapter 295, General Laws of 1899; chapter 141, General Laws of 1887; act April 6, 1901; act March 27, 1886; act March 23, 1889.)

MISSISSIPPI.

Act approved March 9, 1882: Section 1 provides that every person dealing in oleomargarine, or other similar manufactured butter, before offering same for sale, must distinctly and durably mark or brand each package or parcel with the word "oleomargarine," or with whatever name it may be known, and shall offer same for sale by and according to this mark or brand. Every dealer in such articles is required to pay a privilege tax of $50.

MISSOURI.

The law of 1889 requires that the name of any substance made in imitation of butter shall be clearly and indelibly branded, marked, or labeled upon the packages containing same. Hotels or boarding houses serving oleomargarine must clearly and durably mark the vessel in which the compound is served with the words "oleomargarine" or "impure butter."

The law of 1895 defines "imitation butter" as the product made from other than pure milk or cream, made in semblance of butter, and designed to be used as a substitute for butter. The *coloration of imitation butter is prohibited, excepting that intended for export or sale outside of the State*, in which case harmless coloring matter may be added without violating the law. Vessels containing imitation butter are required to be marked with the words "substitute for butter," and to be shipped under its true name.

MONTANA.

An act approved March 4, 1901, forbids the manufacture or sale of any article or substance in semblance of butter or cheese made exclusively

from pure milk or cream, and requires that each package or other inclosure containing such products shall be plainly and durably branded with the words "oleomargarine" or "imitation cheese" to indicate the contents of the package.

Hotels, boarding houses, etc., serving to guests any oleomargarine, imitation cheese, or other similar substances, are required to post up notices to that effect.

House bill No. 80 provides that "every person, company * * * selling oleomargarine, butterine, imitation cheese, and similar substances, shall pay a license of 1 cent per pound for all these articles sold."

NEBRASKA.

Section 2, act of March 5, 1895, provides that no person shall coat, powder, or color with annato, or any other coloring matter whatever, any substance designed as a substitute for butter, whereby such substitute or product *so colored shall be made to resemble butter*, or the product of the dairy, and prohibits the sale within the State of any such colored product.

The act further provides that any article in semblance of natural butter or cheese that is not made exclusively from milk or cream shall be distinctly and durably branded, stamped, or marked so as to advise the purchaser of the contents. This law protects consumers at tables, by requiring keepers of hotels, restaurants, boarding houses, etc., to keep posted a card opposite each table, in a conspicuous place, bearing the following notice: "Imitation butter used here," or "Imitation cheese used here," if such is the case.

NEVADA.

Sections 4906 and 4907, Compiled Laws: Provide that all packages containing any article in semblance of natural butter, manufactured or offered for sale, which is not made exclusively from milk or cream, must bear the word "oleomargarine" distinctly branded or marked thereon.

NEW HAMPSHIRE.

Act approved March 22, 1901: This act prohibits the manufacture or sale of oleomargarine, adulterated butter, or imitation cheese except in a separate and distinct form, and in such manner as will advise the consumer of its real character, *free from coloration or ingredients that cause it to look like butter* or cheese made from pure milk or cream.

Hotels, boarding houses, etc., serving to guests any imitation butter or cheese must notify their patrons to that effect.

NEW JERSEY.

An act of March 22, 1886, provides against the sale of oleomargarine or any substance in semblance of natural butter or cheese except when the tubs, pails, boxes, firkins, vessels, or other packages containing the same are marked or labeled with the words "oleomargarine," "imitation butter," or "imitation cheese."

An act supplemental to the above, approved April 21, 1887, prohibits the sale of oleomargarine, butterine, etc., *containing any coloring matter*, and requires retail dealers selling less than the original package to furnish the purchaser with a printed card or notice of the nature of the substance.

Possession by any person of oleomargarine or any substance not natural butter not contained in a box, tub, or vessel plainly marked and branded in accordance with this act shall be prima facie evidence of intent to sell the same.

NEW MEXICO.

Section 4 of the food act of February 28, 1889, makes it a misdemeanor to sell any article of food which is not of the nature, substance, and quality of the article demanded by the purchaser.

NEW YORK.

The law of April 7, 1902, prohibits the manufacture and sale of imitation butter, whether colored or not, and whether offered for sale as oleomargarine or under any other name whatsoever.

The possession by any dealer of any article or product the manufacture or sale of which is prohibited by this act shall be deemed to have the same for sale if he exposes the same with other merchandise or stock in his place of business.

NORTH CAROLINA.

Pure food laws of February 13, 1899: Section 2 provides that any person, by himself or his agent, who shall knowingly manufacture, sell, or expose for sale, or have in his possession with intent to sell, any article of food which is adulterated or misbranded to deceive the purchaser is guilty of a misdemeanor and punishable by fine and imprisonment.

NORTH DAKOTA.

Act approved March 8, 1901: Section 7639 requires that any person who sells an article in semblance of butter made from oils or fats, and not the legitimate product of the dairy, made exclusively from milk or cream, must legibly and durably brand the product in a conspicuous place with the words "Oleomargarine," "Butterine," or "Patent butter," as the case may be.

OHIO.

Act of May 16, 1894: By the laws of this State oleomargarine may be sold in separate and distinct form, and in such manner as will advise the consumer of its contents, *free from coloration or ingredients that cause it to look like or appear to be butter*. Each package containing such product must be legibly and durably branded with the word "oleomargarine." Hotels, restaurants, etc., using oleomargarine must inform their guests of such fact by means of a printed placard.

OKLAHOMA TERRITORY.

This Territory has no legislation relative to oleomargarine, etc.

OREGON.

Pure-food law.—Act approved February 27, 1901: Section 2 makes it unlawful for any person to offer or expose for sale reworked butter or mixed butter, unless the same is plainly marked "Process butter."

Section 4 forbids the sale of oleomargarine or other substitutes unless put up in a separate and distinct form, and in such manner as will establish their true identity, *free from coloring matter or ingredients causing same to look like butter*.

2687

PENNSYLVANIA.

An act approved May 29, 1901, provides that oleomargarine, or any similar substance not produced from pure cream or milk, *shall be made and kept free from all coloration or ingredients causing it to look like yellow butter*, and the same shall be kept and presented in such a manner as will advise the purchaser and consumer of its real character.

Hotels, boarding houses, and restaurants serving oleomargarine are required to pay a license, and must inform their guests of the nature of the article by means of printed placards.

Oleomargarine must at all times be so marked as to indicate clearly that it is such.

Act approved July 10, 1901, defines renovated butter and provides for manufacture and distinct marking of same.

A penalty is provided for violation of the provisions of any of the above acts.

PHILIPPINE ISLANDS.

Public laws and resolutions passed by the United States Philippine Commission, act 157, section 4, subsection B, page 335: The board of health for the Philippine Islands is authorized to "make inquiry and investigation into * * * employments, conditions, habits, foods, beverages, and medicines, etc." In addition to this city councils are authorized to control the establishment of slaughterhouses and markets and to "provide for and regulate the inspection of meats, fruits, poultry, milk, fish, vegetables, and all other articles of food."

PORTO RICO.

Regulation XXVII.—Standards for articles of food offered for sale in Porto Rico: Paragraph 2 provides that "no butter shall be sold, offered for sale, or transported in or into the island of Porto Rico with the purpose of selling it or offering it for sale as pure butter that contains less than 80 per cent of the fat of cow's milk, more than 16 per cent of water, or more than 7 per cent of salt, and the sale of any article under the name of butter that contains any fat other than that of the milk of cow is prohibited, but this prohibition shall not extend to such goat's butter produced in Porto Rico as may be offered for sale, provided the purchaser is previously informed of its nature."

RHODE ISLAND.

Chapter 146, Public Statutes of Rhode Island, 1896: The laws of this State require that every tub, firkin, box, etc., containing any substance in semblance of butter, and which is not made exclusively from milk or cream, shall bear the word "oleomargarine." Retailers of such substances must deliver to the purchaser a written or printed card bearing the word "oleomargarine."

SOUTH CAROLINA.

Act approved December 22, 1885, makes it a misdemeanor to fraudulently adulterate for purposes of sale any article of food.

SOUTH DAKOTA.

Food and dairy laws.—Act approved March 7, 1901: The laws of this State permit the sale of oleomargarine or filled cheese in a separate and

26872

distinct form, and in such manner as will advise the consumer of the real character, *free from coloration or ingredients that cause same to look like cheese or yellow butter.*

A person having in his possession oleomargarine with intent to sell same is required to place a legible sign in a conspicuous part of the room where such product is sold, bearing the words "Oleomargarine sold here," and shall give to each purchaser a card containing the word "Oleomargarine" and the name and per cent of the ingredients contained therein.

TENNESSEE.

An act approved March 24, 1897, prohibits the manufacture, importation, or sale, or offering for sale, of any article of food or drink which is adulterated or misbranded.

TEXAS.

Article 427 (393), chapter 2, Penal Code Revised Statutes of 1895, provides that any person who fraudulently adulterates for purposes of sale any substance intended for sale with any substance injurious to health shall be punished by a fine not less than $50 nor more than $500.

UTAH.

Food and dairy laws in effect March 14, 1901: Section 736 permits the manufacture or sale of oleomargarine in a separate and distinct form, and in such manner as will advise the consumer of its real character, *free from coloration or ingredient that causes it to look like butter.*

Sections 738 and 739 require that packages containing oleomargarine, butterine, or similar substances, offered for sale, shall be legibly and durably marked to indicate the contents, and further that the room or place in which such products are sold shall have posted in a conspicuous portion thereof a placard bearing the words "Oleomargarine sold here," or "Butterine sold here."

VERMONT.

Act approved November 22, 1900: Section 5 defines butter and cheese as the products usually known by these names and manufactured exclusively from milk or cream, with salt and rennet, and with or without coloring matter.

Sections 1 and 2 require any products made in imitation or semblance of butter or cheese as a substitute for butter or cheese to be sold as such, and the packages containing same to be marked with the following words in a durable and legible manner: "Imitation butter," "oleomargarine," "butterine," or "imitation cheese," as the case may be.

Section 3 provides a penalty for the violation of the above sections.

VIRGINIA.

Act approved March 6, 1900: Section 1 makes it unlawful to manufacture or sell as, or for, butter, any article made wholly or partly of fat or oleaginous substance or compound not produced from pure milk or cream, but it allows the manufacture or sale of oleomargarine, butterine, or kindred compounds, in separate and distinct form, and in such manner as to advise the customer of its real character. Said product *to be free from coloration or ingredients that cause it to look like butter.*

Section 2 requires persons using in preparation of food, or serving butterine or oleomargarine to guests, boarders, etc., of hotels or eating houses, to post up notices in conspicuous public places, as follows: "Imitation butter used here."

WASHINGTON.

Dairy and food laws of 1899, chapter 43: Section 5 makes it a misdemeanor to manufacture or sell as or for butter any oleaginous substance or compound not produced from milk or cream.

The law allows the manufacture of sale of oleomargarine in separate and distinct form, *free from coloration or ingredients that cause it to resemble butter*, and in such manner as to apprise the customer of its real character, but requires that persons dealing in, or serving to patrons, guests, boarders, etc., of hotels or eating houses, to post up notices to that effect.

Section 30 makes it unlawful for any person, firm, or corporation to have in his possession with intent to sell, butter known as "Process butter," unless the package is branded with the words "Renovated butter."

WEST VIRGINIA.

Code of West Virginia, page 1115: The law of this State requires that it shall be unlawful for any manufacturer or vendor of oleomargarine, artificial or adulterated butter, to manufacture or offer for sale within the limits of this State such products *unless the same be colored pink*.

(This law has been held constitutional by supreme court of West Virginia. See *State* v. *Meyers*, 42 W. Va., 822.)

WISCONSIN.

An act approved April 9, 1901, makes it a misdemeanor to manufacture, or sell as or for butter any oleomargarine, butterine, or any substance made in imitation or semblance of yellow butter, but allows the manufacture or sale of oleomargarine in separate and distinct form, and in such manner as to advise the consumer of its real character, *free from coloration or ingredients to cause it to look like butter.* In the room or place where oleomargarine or imitation butter is sold, a placard must be conspicuously posted bearing the words "Oleomargarine sold here," or "Butterine sold here," as the case may be.

Section 4607–D, Statutes of 1898, provides that hotels, boarding houses, etc., dealing in or serving to guests oleomargarine, butterine, or similar substances, must post up notices to that effect.

WYOMING.

Section 5109, Revised Statutes of 1899, provides that any person who adulterates or dilutes any article of food with fraudulent intention to offer the same for sale or to cause or permit the same to be offered for sale as unadulterated and undiluted, is guilty of a misdemeanor and punishable by fine.

O

268
Office Supreme Court U. S.
FILED
DEC 17 1903
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

AUGUST CLIFF, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 221.

FREDERICK J. SCHICK, PLAINTIFF IN error,
v
THE UNITED STATES. } No. 222.

WILLIAM BROADWELL, PLAINTIFF IN error,
v.
THE UNITED STATES. } No. 223.

LEO. W. MCCRAY, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 301.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON THE QUESTION OF JURISDICTION, WITH ADDITIONAL REMARKS UPON THE MERITS.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

AUGUST CLIFF, PLAINTIFF IN ERROR, v. THE UNITED STATES. } No. 221.

FREDERICK J. SCHICK, PLAINTIFF IN ERROR, v. THE UNITED STATES. } No. 222.

WILLIAM BROADWELL, PLAINTIFF IN ERROR, v. THE UNITED STATES. } No. 223.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

LEO. W. MCCRAY, PLAINTIFF IN ERROR, v. THE UNITED STATES. } No. 301.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON THE QUESTION OF JURISDICTION, WITH ADDITIONAL REMARKS UPON THE MERITS.

I. RESPECTING JURISDICTION.

These cases were all proceedings to recover a penalty, incurred under section 11 of the oleomargarine act.

The Cliff, Broadwell, and Schick cases were instituted by information, and a stipulation was filed, whereby a trial by jury was waived.

The McCray case was instituted by petition. The defendant filed an answer, to which the plaintiff demurred, and the demurrer was sustained by the court.

As to the nature of an information to recover a penalty—whether civil or criminal.

A penal *action* is defined to be the civil suit brought for the recovery of a statutory forfeiture when inflicted as a penalty for an offense against the public. (16 Ency. Pl. and Prac., p. 231, and cases cited.)

In *Atcheson* v. *Everett* (1 Cowp., 382) Lord Mansfield said:

> There is no distinction better known than the distinction between civil and criminal law; between criminal prosecutions and civil actions. Mr. Justice Blackstone and all modern and ancient writers upon the subject distinguished between them. *Penal actions were never yet put under the head of criminal law or crimes.* * * * It is as much a civil action as an action for money had and received.

Informations to recover penalties and forfeitures seem to have been recognized as civil proceedings by this court, although in *Ex parte Wilson* (114 U. S., 417) the fact was noted that in recent years *prosecutions* by information have greatly increased.

In *Clifton* v. *United States* (4 How., 242), the court said that an information for a forfeiture "is in the nature of a criminal proceeding," and for that reason held that one good count was sufficient to support a verdict and judgment upon all the counts, though some were bad. In *Snyder* v. *United States* (112 U. S., 216), it was held that while informations under the revenue laws are not strictly criminal cases, but are civil actions, yet "they are so *in the nature* of criminal proceedings as to come within the rule that a general verdict, upon several counts seeking in different form one object, must be upheld if one count be good." [Citing *Clifton* v. *United States*, 4 How., 242, 250.]

A distinction is thus indicated between such informations and those for the recovery of a penalty; in the one case the proceeding being *in rem* and in the other *in personam*.

The statutes also seem to make a distinction between penalties and forfeitures on the one hand and criminal offenses on the other (secs. 1044, 1046, 1047, R. S.), and the oleomargarine law appears to notice the legal distinction between a fine and penalty (secs. 4, 6, 7, 9, 12 *et seq*); but in view of the word "offense" in section 11 of the oleomargarine act, there is ground for saying that the penalty which it provides was imposed as a fine for the violation of what is made a misdemeanor.

If an information to recover a penalty be a civil action, trial by jury in these cases could have been waived; but in the absence of an agreed statement of facts, how far are the judgments therein open to review?

In *Henderson's Distilled Spirits* (14 Wall., 33), the court said:

> Being a seizure on land, the claimant was entitled to a trial by jury, but he appeared and the parties entered into a stipulation waiving a jury, and submitted the case to the court *upon an agreed statement of facts*, as they had a right to do, even before any legislative provision was enacted for waiving a jury by a written stipulation.

In *Rogers* v. *United States* (141 U. S., 548) the parties filed a written stipulation waiving the right of trial by jury, and the court filed findings of fact, which stated that it had "heard the testimony of the witnesses." Upon these findings judgment was rendered for the United States. This court said:

> The circuit court could not properly consider *any of the matters raised by the bill of exceptions;* nor can this court do so. All that the circuit court could do was to affirm the judgment of the district court; and all that this court can do is to affirm the judgment of the circuit court.
>
> * * * * *
>
> *Without considering any questions on the merits*, the judgment of the circuit court is therefore affirmed.

It may be doubted, however, whether, in the *Rogers* case, the court intended to be understood as holding that no question of law presented by the record in a civil case, tried by the court without an agreed statement of facts, could be reviewed on error, even if that question appeared independently of any issue of fact decided by the court. The court did not, in the present cases, make any findings of fact, there being no dispute as to the matters of fact out of which the constitutional questions arose. In the *Rogers* case, the particular question of law presented for determination rested upon the disputed fact, found by the court, that the bond sued on was given voluntarily. Here, the constitutional questions are distinctly presented in the several motions to find the defendant not guilty, as well as in arrest of judgment, and resting as they do upon undisputed facts, would seem to be open to review, the court confessedly having jurisdiction.

Trial by jury in criminal cases—when a constitutional right.

Treating the present proceedings by information as criminal actions, it seems proper to consider, at the outset, in what cases trial by jury is a matter of constitutional right.

The authoritative decision on this question is *Callan* v. *Wilson* (127 U. S., 540). In that case,

Mr. Justice Harlan, delivering the opinion of the court, said (p. 552):

> According to many adjudged cases, arising under constitutions which declare, generally, that the right of trial by jury shall remain inviolate, there are certain minor or petty offenses that may be proceeded against summarily and without a jury; and in respect to other offenses, the constitutional requirement is satisfied if the right to a trial by jury in an appellate court is accorded to the accused.

The opinion proceeds to cite State authorities [among others *Byers* v. *Commonwealth*, 42 Pa.; see reference thereto in Mr. Guthrie's brief on jurisdiction, p. 10] which recognize the extensive and summary power constantly exercised in the States for the repression of breaches of the peace and petty offenses, which is not supposed to conflict with the constitutional provisions securing to the citizen a trial by jury. It is true that these cases are based upon particular State laws, and that the offenses principally in mind are those which violate various municipal regulations.

The doctrine which that case establishes is that those misdemeanors of a *serious* character which were triable by jury at common law, and which involve a deprivation of the liberty of the citizen, must, as a matter of constitutional right, be tried by jury in courts of the United States.

Assuming that section 11 of the oleomargarine act makes the act of purchasing or receiving oleo-

margarine which has not been branded or stamped as required by law a misdemeanor, it can hardly be classed, like the offense of conspiracy, involved in *Callan* v. *Wilson*, among those crimes the nature and consequences of which are so serious as to entitle a person accused thereof to trial by jury.

In *Brewster* v. *The People* (183 Ill., 143), in which it was held that, in view of the peculiar wording of the State constitution, the right of trial by jury in the case of a misdemeanor, punishable only by fine and imprisonment, could be waived, the court said:

> "No jury trial in criminal cases was ever known to the common law, but such as followed upon indictment in a common-law court, after the accused was in custody, had been arraigned, and had pleaded [not] guilty to the indictment." (*People* v. *Fisher*, 20 Barb., 656; *People ex rel.* v. *Justices*, 74 N. Y., 406; *State* v. *Conklin*, 27 Vt., 319.) As jury trials in criminal cases, as known to the common law, were such as followed upon indictment in a common-law court, and as our Constitution refers to the right of trial by jury, as it was understood at common law, then the prohibition against the right to waive a trial by jury can not apply to misdemeanors, because the Constitution expressly provides that, in cases of misdemeanors, a person may be held to answer without indictment.

It is doubtless proper to observe that the practice in the district courts of the United States has been

to try all criminal cases, whether felonies or misdemeanors, by jury. Those courts have no jurisdiction of municipal offenses, such as were referred to in *Callan* v. *Wilson* as those in which trial by jury would not be a matter of constitutional right. In that case the court was confronted with the peculiar situation which exists in the District of Columbia, where the courts of the United States exercise both a general and a municipal jurisdiction. And it is also true that there is no Federal statute expressly authorizing waiver in criminal cases like the State statutes of that kind.

It is also to be observed that Mr. Justice Story, in *United States* v. *Gibert* (2 Sumn., 19; Fed. Cas. No. 15204), was of opinion that in the case of a misdemeanor there never could be any other trial than by jury. The charge in that case was robbery on the high seas.

In the case of *Bonner* (151 U. S., 242) the view was expressed that the trial of a criminal case in a Federal court could be in no other way than by jury. The charge in that case was larceny.

As to waiver.

In *United States* v. *Taylor* (11 Fed. Rep., 470) an information had been filed in the district court for the district of Kansas, charging the defendant with the offense of carrying on the business of a retail liquor dealer without having paid the special taxes required by law. In the course of the trial the court directed the jury to return a verdict of

guilty. This was held to be error by the circuit court, which, in the course of its opinion, referring to the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed guaranteed by the sixth amendment, said:

> This is a right which can not be waived, and it has been frequently held that the trial of a criminal case before the court by the prisoner's consent is erroneous.

It seems that the contrary view as to the right of the court to direct the jury to return a verdict against the defendant had been announced by Mr. Justice Hunt in the case of *United States* v. *Anthony* (11 Blatchf., 200). But Judge McCrary, in commenting on that case, remarks that Judge Hunt seems himself to have doubted the soundness of the ruling, because upon a subsequent trial for the same offense a verdict of guilty was not ordered and the case was submitted to the jury; and it should be observed that Judge McCrary also states that he had consulted Mr. Justice Miller, who authorized him to say that the learned justice concurred in the conclusion which Judge McCrary reached.

United States v. *Shaw* (59 Fed. Rep., 110), however, distinctly asserts the right of an accused person to waive trial by jury. The court said:

> Many of the cases where the right of the accused to consent to the discharge of a juror is denied were those where the accused

was being tried for murder, and there might be capital punishment. (See *Cancemi* v. *People*, 18 N. Y., 128; *Territory* v. *Ah Wah*, 4 Mont., 149, 1 Pac., 732; *Hill* v. *People*, 16 Mich., 354.)

In the case under consideration the offense charged, of which the defendant has been convicted, is declared by the statute to be a misdemeanor; and had the juror Pendleton been discharged by the court with the consent of the defendant, we are of opinion that both reason and the weight of authority would have sustained the action of the court, and the discharge would not have been a legal ground for a new trial. (See *Tyra* v. *Com.*, 2 Metc. (Ky.), 1; *State* v. *Kaufman*, 51 Iowa, 578; *Com.* v. *Dailey*, 12 Cush., 80.)

In the *Belt case* (159 U. S., 95) it appeared that the supreme court of the District of Columbia had sustained the constitutionality of an act of Congress providing that in prosecutions in the police court of the District, in which, according to the Constitution, the accused would be entitled to a jury trial, the accused might in open court expressly waive such a trial and request to be tried by the judge. This court did not, however, pass upon that question, holding that the only question presented was as to the jurisdiction of the supreme court of the District to decide the matter, which it upheld. In that case, however, the court refers to *Hallinger* v. *Davis* (146 U. S., 314, 318), in which it was said:

> Upon the question of the right of one charged with crime to waive a trial by jury and elect to be tried by the court, when there is a positive legislative enactment giving the right so to do, there are numerous decisions by State courts upholding the validity of such proceeding.

In *Hallinger* v. *Davis* it is to be observed that the court was passing upon a State law authorizing a jury trial to be waived, and upheld it although the crime was capital.

In *Thompson* v. *Utah* (170 U. S., 343) the court, speaking by Mr. Justice Harlan, said (p. 353):

> It is said that the accused did not object, until after verdict, to a trial jury composed of eight persons, and therefore he should not be heard to say that his trial by such a jury was in violation of his constitutional rights. It is sufficient to say that it was not in the power of one accused of *felony*, by consent expressly given, or by his silence, to authorize a jury of only eight persons to pass upon the questions of his guilt. The law in force when this crime was committed did not permit any tribunal to deprive him of his liberty, except one constituted of a court and a jury of twelve persons.

The inference from this adjudication is that in cases of felony trial by jury can not be waived; for if an accused can not consent to be tried by less than twelve jurors, he can not consent to dispense with a jury altogether.

The ruling in *Thompson* v. *Utah*, as shown by the reference therein to the *Hopt case* (110 U. S., 574), proceeds upon the theory that the accused is not the only one concerned in the manner of his trial, but that society in general is interested in all proceedings that affect or destroy either the life or liberty of its members.

The language of the third article of the Constitution is imperative—"the *trial* of all crimes, except in cases of impeachment, *shall* be by jury." The *right* of trial by jury was protected in the sixth and seventh amendments. They provide respectively:

Sixth amendment.

> In all *criminal prosecutions*, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Seventh amendment.

> In *suits at common law*, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law.

In *Bank of Columbia* v. *Okely* (4 Wheat., 244) the court, in holding that the defendant could properly be held to have waived his right to a trial by jury in that case, a civil suit, said:

> That this view of the subject is giving full effect to the seventh amendment of the Constitution is not only deducible from the general intent but from the express wording of the article referred to. Had the terms been that "the *trial* by jury shall be preserved" it might have been contended that they were imperative and could not be dispensed with, but the words are, that the *right* of trial by jury shall be preserved, which places it on the foot of a *lex pro se introducta*, and the benefit of it may therefore be relinquished.

May not the same idea be attributable to the *Sixth* Amendment; and is it not therefore permissible, in dealing with a minor offense, as here, to waive the right, without contravening the general and imperative provision of the Constitution itself as to *serious crimes?*

As to the suggestion that the defect, if one exists, is matter of procedure, and does not constitute a vital lack of jurisdiction, I submit whether the question of waiver here may not be held similar to that raised in the *Maxwell cases*, wherein the question is put in this form: "Is the judgment of the court, not being based on the verdict of a jury, a nullity, or is a trial by the court without the

waiver of a jury at most only error?" (*Maxwell* v. *Stewart*, 21 Wall., 71; 22 Wall., 77; *Humphreys* v. *District of Columbia*, 174 U. S., 195.)

The McCray case properly before the court.

Whatever the fate of the proceedings by information, the McCray case would appear to be properly before the court. That case is civil in form as well as in substance; and, having been decided upon demurrer to the answer, no question as to trial by jury is presented. The vital question in all of these cases, namely, the constitutionality of the act, may therefore in any event be determined by the court, in the light of those facts of which it can take judicial notice.

II.—ADDITIONAL REMARKS UPON THE MERITS.

The reply brief.

Judge Cooley in *Constitutional Limitations* not only says that not everything which may be done under the name of a tax is not necessarily a tax, but also that (p. 593):

> The power to impose taxes is one so unlimited in force and so searching in extent that the courts scarcely venture to declare that it is subject to any restriction whatever except such as rest in the discretion of the authority which exercises it.

The context shows that the abuse which he is deprecating is the levying of a tax for private benefit in reality, although ostensibly for public objects.

The learned gentlemen are mistaken in saying that I have fallen into serious error as to the law of Illinois. The law which I quoted is on the statute books of that State, and shows the intent of its legislature and how completely that body was intending to carry out the will and policy of the people. Counsel unwarrantably state that Illinois "does not prohibit, but *freely permits*" the manufacture and sale of colored oleomargarine, because in one case in a court of that State (not the supreme court), initiated by the same oleomargarine manufacturer, who is the real complainant here, the prohibitive feature of the State law was declared to be unconstitutional. And another case is cited in which the ground of decision was that the suit was a collusive one between two dealers in oleomargarine.

As to the remainder of the act, which Mr. Guthrie says is found to afford adequate protection to the public against injury, it is to be observed from his abstract "that no person shall be allowed to have in possession or under control any package of oleomargarine except for personal consumption or that of his family." If this section does not mean to strike at the deception in houses of public entertainment and does not justify the distinction which I have noted between a sale possibly open and fair and an illicit use between the sale and the consumption by which the real consumer unknowingly receives the article as butter, I am unable to see what its purpose is.

There is no change of front in the Government argument. It was never admitted by the Government that the tax is prohibitory or destructive. Nevertheless the Government's formal position, sustained by the lower court, that evidence to that effect was immaterial, was and is correct. Yet the Government now has a perfect right upon these records to argue that the tax does not amount to prohibition or destruction.

On pages 14 to 18 of the reply brief counsel appear to think that they have directed a destructive criticism against the Government figures showing that the injury to the colored oleomargarine business has not been excessive. They charge that the Government excluded uncolored oleomargarine from the total production under the old act (which is *not* the fact), and then proceed to do exactly the same sort of thing which they unwarrantably charge the Government with doing—that is, they impressively allege that there has been a falling off from 123,000,000 pounds in production to 2,700,000 pounds, or nearly 98 per cent, but studiously exclude the 68,000,000 pounds of uncolored oleomargarine which were produced during the period under review.

The whole import of the opposing argument is that oleomargarine is only oleomargarine when it competes with butter; in other words, when it is colored; that when it is uncolored, in its natural state, it is really not oleomargarine at all. Concealed in all this there is the simple demand that

the oleomargarine interests shall be left free to compete with butter.

Now observe how counsel argue both that there was and that there was not such an article as uncolored oleomargarine before the present law. At one point they manifestly contemplate the uncolored article as existing and produced under the old law. They show this contemplation more clearly when they say the one-fourth cent tax is a new levy on a *hitherto* untaxed article—"an article *theretofore* free from any tax;" and they immediately proceed to state, with the idea of showing that the tax on the uncolored article is a new tax and no tax on that article was ever imposed before, and the Government's claim of reduction of tax on the uncolored article is erroneous, that all oleomargarine, "*properly so called*," was sold as a substitute for butter, and that therefore it had to be colored as butter to meet the consumer's demands. In other words, the only possible meaning of this claim is clearly antagonistic to what has preceded, that all oleomargarine before the new act was passed was colored, and that there was then no such thing as uncolored oleomargarine. And if the latter contention is the real one, and if that was indeed the fact, then manifestly they were proceeding in defiance of State laws.

It is, of course, impossible to maintain that uncolored oleomargarine was unknown before the law of 1902 was enacted (see *post*). But either

there was or there was not uncolored oleomargarine prior to July 1, 1902. If there was, then it was taxed at 2 cents per pound, and the present tax is a reduction. If there was not, then the Government figures as to the total production are not subject to the untenable challenge which counsel make, and the present falling off in production is as the Government states and not as counsel seek to show. In any case it seems plain to me that Mr. Guthrie has entangled himself in the same dilemma which he seeks to cast around the Government (pp. 15–17, reply brief).

I remark that Mr. Guthrie's own brief in the second case of *Collins* v. *New Hampshire*, involving a later New Hampshire law, heard at October term, 1901, and affirmed by an equally divided court (187 U. S., 636, 637), speaks of colored oleomargarine and *uncolored* or *white* oleomargarine.

The words "regulatory tax" referred to by counsel were only used in the Government's brief in referring to certain remarks in the Senate debate, and were simply transferred from the language there used. The Government does not call this a *regulatory* tax, except in so far as appears in *In re Kollock*, and this word was not intended to import and does not import any illegitimate regulation of State commerce.

I am entirely unable to comprehend what counsel means when asserting that the higher rate affords no such protection against evasion, as the argument in the Senate suggested. They say,

"On the contrary, the increased gain to such offenders by reason of the higher rate would only be a so much greater incentive to offend." The force of that observation escapes me, because I can not understand how the higher rate would be an increased gain to offenders, unless it is meant that some persons would proceed to offend notwithstanding the law, and would be successful in passing off their product as butter, and thus escape even the one-fourth cent tax.

The difference between oleomargarine and butter is difficult to detect, not "because they are practically the same, contain the same ingredients, and are equally palatable, digestible, and wholesome." Counsel can not justify this statement by the insertion of the word "practically;" they do not contain the same ingredients; they do not even contain the same chemical elements, except in part, and few people, I imagine, upon an *experimentum in corpore vili*, would testify that they are *equally* palatable, digestible, and wholesome; although it may possibly be (the proposition is disputed) that oleomargarine is palatable, digestible, and wholesome. The difference is difficult to detect simply because the *physical appearance* of the two articles—butter and colored oleomargarine—is practically the same.

Counsel, pursuing the suggestion of *reductio ad absurdum*, uses another two-edged word when he characterizes a part of the Government argument as "preposterous" (p. 20). Counsel can not affect

to misunderstand what the Government brief meant when it spoke about the colored article as inevitably imitative and fraudulent in effect. The statement could not possibly be misinterpreted as referring to anything else than butter in suggesting imitation. And so counsel, after the dialectical play, concludes with a second assertion of the utter fallacy of the Government's reasonable suggestion that the high tax on the colored article would naturally tend to prevent its escaping all tax because it counterfeited the untaxed article, butter.

I presume that counsel in their conclusion on this matter (p. 21, reply brief), saying "in order to facilitate the collection of revenue on *colored* oleomargarine," do not intend to misstate the word, since they are perfectly well aware that it is the collection of revenue on *uncolored* oleomargarine which may be thus facilitated and protected.

Counsel say, in arguing that the court will not uphold this tax as seeking "to *destroy* a counterfeit or imitation of an *untaxed* article," and that the fraud practiced has been with respect to butter—that "in view of the strict supervision exercised by the Government over manufacturers it is unreasonable to suppose that the payment of taxes could be evaded because of the resemblance to butter, *or that Congress intended to strike at any such evil.*" But counsel plainly themselves suppose that Congress intended to strike at the evil; otherwise they would not have pointed out the debates to the court, which was done to inform

the court that the motive of Congress was to strike at the evil, and was unwarrantable and unjust. But here, it may be, they refer to the evil of thus evading the tax, and not the evil of imitating butter, considered by itself.

The customs decisions which counsel cite, holding that under a law which continued the precarious color standard as to the quality of sugar the later and more accurate and scientific polariscopic test could not be required by Treasury regulations, are not applicable. Here there is no such defective legislation of Congress, and the law does not permit such an evasion of this act, because if there is any artificial coloration, oleomargarine being naturally white, though not pure white, the determination of the question is legally conferred upon the Commissioner. Here the law expressly says that if the goods are manufactured in a certain way, the burden of the high duty rests upon them. There is no ambiguity which calls into effect a Department regulation of doubtful validity, but the law itself makes the regulation. The Commissioner is not altering or enlarging the law by a regulation, but he simply decides the question of coloration under an explicit authority conferred by the law.

The facts and figures again.

It was argued that the Government having, by the reference to the remarks of certain Senators made during the debates on the amendment (Government brief, p. 63), opened the door to a general

reference to the debates, the plaintiffs in error are entitled to make general reference thereto in order to show the intention of Congress in imposing this tax.

But the remarks of the Senators to which attention was directed by counsel for the Government were made in support of the proposition that Congress had the legal right to impose the tax; and in suggesting this argument in the brief I did not show the motives or mere opinions of the legislators. Mr. Guthrie's own reading from the debates shows the strength of the legal argument made by a distinguished Senator and lawyer for sustaining the higher tax on the colored article to prevent the easy evasion of the tax on the uncolored article, by reason of the resemblance to the untaxed article—butter—that is, to prevent evading the payment of any tax at all.

The difficulty with counsel for plaintiffs in error in arguing (brief in reply, p. 16) that the ¼-cent tax was not a reduction, but a new tax on a theretofore untaxed article is that they frequently collide with their own arguments as I have already endeavored to show. Thus, on page 14 of their principal brief, as showing the history of the manufacture of oleomargarine, they refer the court to the Ency. Brit., vol. 17, p. 760; Cent. Dic. and Cyc., vol. 5, p. 4101. They might also have cited Ency. Brit., vol. 4, p. 592; Cent. Dic. and Cyc., vol. 1, p. 738; and Stand. Dic., vol. 2, p. 1225.

These books of reference cited by opposing counsel show that originally there was a wide distinction between oleomargarine as it was then known and what they now claim it *to have been*. Originally oleomargarine was made from the leaf or caul fat of cattle, and "imitation butter" or "butterine" (now included under the term "oleomargarine") was made by churning *with oleomargarine*, milk, cream, or butter, so as to make an imitation butter; or, as it was then commercially known, "imitation butter" or "butterine." These distinctions apparently existed at the time of the passage of the oleomargarine act in 1886, for each is specifically named in the second section thereof. That section provides, "That for the purposes of this act," "all substances heretofore known as oleomargarine, * * * butterine, lardine, suine," etc., "shall be known and designated as oleomargarine." From this it seems clear that the substance *which is now claimed to have been oleomargarine* was, at the time of the passage of the act of 1886, *commercially known* as "butterine" or "imitation butter." Even now there is a distinction between the legal and the commercial meaning, for Dadie says (Cliff Rec. pp. 18, 19) that while legally it is called "oleomargarine," "in trade it is known as butterine."

So when counsel assert that prior to the passage of the amendment of May, 1902, there was no substance embraced within the term "oleomargarine" as defined in the original act, free from artificial

coloration, they squarely contradict the historical facts to which they have called attention. So far is it from the truth that the uncolored article was not being manufactured and would have been exempt from tax had it been manufactured, that it was the *one* substance known at the time of the passage of the act as *oleomargarine*, and formed the basis of all other similar substances used as a substitute for butter, and which were afterwards, by the express language of the act, designated, for the purposes of taxation, as oleomargarine.

It was urged that the act was not a revenue act, because the revenue produced under its operation was but trifling. In answer to this claim we call attention to the report of the Commissioner of Internal Revenue for the year ending June 30, 1903. Upon pages 158 and 159 of the report is this information:

Taxes collected on colored oleomargarine, at the rate of 10 cents per pound	$272,044.48
Taxes collected on uncolored oleomargarine, at the rate of one-fourth cent per pound	171,227.48
License taxes:	
Manufacturers	19,900.00
Retail dealers in colored oleomargarine	73,638.25
Retail dealers in uncolored oleomargarine	107,159.36
Wholesale dealers in colored oleomargarine	30,538.16
Wholesale dealers in uncolored oleomargarine	58,988.72
Total revenue	736,783.31

The table also shows that there were imported during the year nearly 22,000 pounds of oleomarga-

rine, upon which a tax of 15 cents per pound was paid.

Upon pages 154 and 155 of the report the total production for the year is shown to be:

Uncolored oleomargarine	pounds	67,573,689
Colored oleomargarine	do	5,712,257
Total		73,285,946

Of the colored oleomargarine produced, the tax of 10 cents per pound was paid upon 2,312,493 pounds, the remainder being exported free of tax.

It was further claimed that the production of oleomargarine for the months of July, August, and September of the present year shows a falling off in production from the corresponding months of the previous year, thus indicating a gradual destruction of the industry. To show that this is not the fact, but that the production of oleomargarine is always less during the summer than during the winter months, we print below a letter from the Commissioner of Internal Revenue, in which is set out the monthly production of both colored and uncolored oleomargarine from the time the present law took effect to October 1 of the present year:

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, December 7, 1903.

Hon. H. M. HOYT,
Solicitor-General.

SIR: In compliance with your request of the 5th instant, I have the honor to state that the production of oleomargarine

taxed at the rate of 10 cents per pound and at the rate of one-fourth cent per pound, from July 1, 1902, the time the present law took effect, to November 1, 1903, is as follows:

Month.	Production, 10 cent tax.	Production, one-fourth cent tax.
1902.		
July	283,825	4,645,204
August	261,077	3,139,914
September	432,253	4,375,149
October	507,844	6,365,767
November	509,815	6,613,311
December	746,968	8,854,808
1903.		
January	603,834	7,346,436
February	556,606	6,356,339
March	598,163	6,355,464
April	541,628	6,362,625
May	356,650	3,742,080
June	311,744	3,416,592
July	284,828	3,268,805
August	285,261	3,502,618
September	281,053	4,268,993
October	322,077	4,987,703

Respectfully,

ROBT. WILLIAMS, JR.,
Acting Commissioner.

During the argument the question was asked from the bench whether an internal-revenue tax was now imposed upon other articles than tobacco and liquors. The list of articles is as follows:

OPIUM. Section 36 of the tariff act of October 1, 1890 (26 Stat., 567), imposed an internal-revenue tax of $10 per pound upon all opium manufactured in the United States for smoking purposes, and provided that no person other than a citizen of the

United States could engage in its manufacture. That act also imposed an import duty of $12 per pound upon all opium imported for smoking purposes.

Under the tariff act of July 24, 1897 (30 Stat., 153), the duty on opium imported for smoking purposes was reduced to $6 per pound. As a result, no opium for smoking purposes is manufactured in the United States.

FILLED CHEESE.—The act of June 6, 1896 (29 Stat., 253), after imposing special taxes on manufacturers and dealers in filled cheese, and after defining what should constitute filled cheese, imposed a tax of one cent per pound thereon. This act is now in force.

MIXED FLOUR.—Sections 35 to 47 of the war-revenue act of June 13, 1898 (30 Stat., 467), after defining "mixed flour," and after imposing special taxes on persons making, packing, and repacking the same, imposed a tax thereon of 4 cents per barrel; and, when such flour is imported, in addition to the import duties, the same internal-revenue tax shall be paid thereon.

This act is now in force.

PLAYING CARDS.—By the act of August 28, 1894 (28 Stat., 509), a stamp tax of 2 cents was imposed upon each pack of playing cards. This law is now in force.

The act of May 9, 1902 (32 Stat., 193), being the act amending the oleomargarine law, after defining "adulterated butter" and "process" or

"renovated butter," and after imposing special taxes upon the manufacturers and dealers therein, imposes a stamp tax of 10 cents per pound upon "adulterated" butter and a tax of one-fourth cent per pound upon "renovated" or "process" butter. This act is now in force.

I believe these are the only articles upon which an internal-revenue tax is at present laid. It is to be assumed that Congress, in selecting these subjects for taxation, has kept in view the general welfare of the people. It is also to be noted that Congress in imposing these taxes has laid them upon articles which are the objects of luxury or indulgences, or by means of which it is likely that fraud and deception will be practiced.

Where is the dividing line at which a law taxing oleomargarine loses its character as a revenue measure and becomes a regulation? Is it the point at which it is no longer possible to sell it in the market at butter prices and reap a good profit? If this be the true test, then the rate of tax which may be imposed will shift from time to time with the price of butter, a certain rate of tax being constitutional one day and unconstitutional the next. Oleomargarine, under its disguise, while also competing with the butter produced on the farm, competes especially with creamery butter. To compete with the butter from the farm it is packed in tubs as the farm butter generally is packed; in competing with creamery butter it is generally packed in prints and rolls

as that article generally is packed. Now it has occurred (and may occur again) that during the summer months farm butter has retailed in the market at from 10 to 12 cents per pound. Suppose that in order to secure a sufficient market for their product it would be necessary for the oleomargarine manufacturers to compete with farm butter at these prices, and they should insist that this could not be done if, say, the old rate of tax, 2 cents per pound, were exacted. Might they not insist, therefore, with equal force, that a tax of 2 cents per pound was unconstitutional because it made it impossible for them to sell their products at butter prices? If this law is to be declared invalid because the tax, in the opinion of the court, is excessive, at what rate may Congress constitutionally fix the tax?

The special brief for Cliff.

It is asserted in the brief filed by Mr. Harlan (p. 8) that to be oleomargarine within the terms of the act a given compound must have three characteristics: (*a*) It must be composed of some of the substances named in section 2 of the act; (*b*) it must be "made in imitation or semblance of butter;" and (*c*) when "made in imitation or semblance of butter," it must be "calculated or intended to be sold as butter or for butter." All three of these characteristics, it is said, must coexist in any compound before it can be said to be oleomargarine.

This proposition is untenable. To reach that conclusion counsel must read into the act something that is not there; or, he must give to the disjunctive conjunction "**OR**" the same meaning as the conjunction "**AND**." The language of section 2 is:

> "That for the purposes of this act," * * * "all substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine," etc., * * * "made in imitation or semblance of butter, **OR** when so made, calculated, or intended to be sold as butter or for butter," "shall be known and designated as oleomargarine."

If the act had read, "made in imitation or semblance of butter, **AND**, when so made, calculated or intended to be sold as butter or for butter," then there would be some force in the claim. It is apparent that in using the word "**OR**," Congress intended that any of the named substances "made in imitation or semblance of butter" should be liable to the tax irrespective of whether it was made or sold or intended to be sold as oleomargarine or as butter. In other words, the sale, or the intent to sell, the compound "as butter or for butter," is not necessary to subject the compound "made in imitation or semblance of butter" to the payment of the tax.

The word "**OR**" is a disjunctive conjunction coordinating two or more words or clauses, each one of which in turn is regarded as excluding consideration of the other or others (Century Dictionary).

The position taken here by counsel for the Government is in full accord with the opinion of Attorney-General Garland of October 18, 1886 (18 Opin., 489), and the opinion of the Commissioner of Internal Revenue of January 12, 1903. The opinion of Judge Grosscup (125 F. R., 331) is in line with these rulings.

If it be true, as contended for by opposing counsel, that in order to subject oleomargarine to the payment of the tax it must have been made in imitation or semblance of butter, **AND** made with the intention to sell as butter, then it was idle for Congress ever to have passed the law; for no manufacturer of oleomargarine would admit that he made the article in imitation or semblance of butter for the purpose or with the intention of selling it "as butter or for butter." The burden would, in all cases, be on the Government to prove that intent before it could subject a single ounce of oleomargarine to the payment of the tax. It would be a futile and meaningless tax law.

As to the second proposition advanced by Mr. Harlan, it is sufficient to say that butter, as is well known, varies in color from the winter color (white with the faintest tinge of yellow) to June yellow. Any product, therefore, in imitation or semblance of butter of any shade of yellow, ranging from the winter to the June color, or more highly colored, is subject to the tax. As we have pointed out, the original oleomargarine was made out of the leaf or caul fat of cattle, which gave it a

somewhat resemblance in color and consistency to that of winter butter.

Mr. Harlan's next proposition is, in effect, that since vegetable oil is a statutory ingredient of oleomargarine, the use of any vegetable oil in the manufacture of oleomargarine, no matter how small in quantity or how great a coloration it imparts to the product, and no matter how deleterious to the wholesomeness of the product, does not constitute an artificial coloration within the meaning of the statute. The language of the statute is:

> All mixtures and compounds of tallow, beef fat, suet, lard, lard oil, VEGETABLE-OIL ANNOTTO, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance of butter.

The court will observe that the words "vegetable" and "oil" are connected by a hyphen and that there is no comma between the word "oil" and the word "annotto;" and then follow the words "and other coloring matter."

It seems then that Congress, in using the term "vegetable-oil annotto," did not intend to class that product with the fatty substances, but with the coloring elements. The language means that "annotto" when produced from the arnotto tree (Century Dictionary) may be used as a coloring, but *not* when manufactured from coal-tar products. Originally annotto was produced wholly from the fruit of the arnotto tree; it is now also derived from coal-tar products.

The Government does not contend that the effect of the statute is to prohibit the use of substances other than those named, or that vegetable oils may not properly be used in the manufacture of oleomargarine. Some vegetable oils are, in fact, used. Whether they were being used in 1886, at the time of the passage of the original act, counsel is not now advised. But the Government does not concede that *all* vegetable oils may be used. What the Government claims is, that vegetable oils must be of such character as to be naturally adapted for use as food in the form in which used; they must be wholesome and palatable irrespective of the quantity used; otherwise they can not be said to be a *natural* ingredient.

Obviously there are many vegetable oils which are not fit for this use, and when unpalatable or unwholesome the manufacturers certainly would avoid them as ingredients, in large or small quantities, because they would injure the sale of the product. Similarly the commercial motive would prevent them from using an ingredient which is too costly, or unavailable for any other reason, like limited amount of supply. So, when they use a vegetable oil ingredient which is unpalatable or unwholesome, or partially deleterious, in such small quantities as to be negligible in its substantive effect, and the article gives a color, then not only is the intention clear, but the artificiality and the consequent violation of

the law are equally clear. That the article is a *natural* substance in general, produced by or from nature, instead of compounded by art, does not make it any the less artificial *quoad* the coloring of oleomargarine. It is probable that well-known artificial colors are "natural" in the same sense, and are harmless. I have always understood that they are made from carrots and other vegetable materials. This is what "vegetable-oil annotto" means. It is only the conjunction of the right color, for the forbidden use, in small quantities, with the vegetable oil origin, which leads the manufacturer to use palm oil, and permits Mr. Harlan to make his ingenious but untenable argument.

I have no doubt that many experiments have been made and are in progress to find an oil which may be used as a fit and natural food ingredient and which, when so used, will impart the desired color. It is obvious that many factors condition the problem—cost, supply, substantive effect upon the product, color, and the right *degree* as well as "*primary*" *relations* thereof (*i. e.*, between red, orange, yellow), because unless the color is concentrated the oil proportion would overbalance the solid elements and the necessary hard consistency would not be attained. A mere *yellow* oil like peanut oil, otherwise desirable, would not do.

So that the manufacturers in seeking to meet the law, or rather to evade it, take this highly colored and unfit vegetable oil, with an excess of

deleterious acids even when refined, and, finding in accordance with the laws of color that a dilution of red and orange produces yellow, and that this substance used in small quantities in oleomargarine yields that color, and does no injury (as it is claimed), because the deleteriousness is minute, assert that they are using a proper ingredient and that the color thereby imparted is not artificial. It is impossible to sustain this argument upon any reasonable view of the facts or any proper conception of legal logic.

It will be recalled that pink, in the New Hampshire case, was called a *discoloration*. Is not yellow also a discoloration of *oleomargarine?* Suppose a proper oil ingredient naturally gave a pink tinge, would that color, then, be discoloration?

Let us examine the question of the nature of palm oil, as shown by the evidence and by science. Is it really a *natural* ingredient of oleomargarine as claimed by opposing counsel? On page 97 of the brief for the Government the character of the oil is pointed out, the statement being based upon the finding of the Commissioner, the statements found in the works of the two chemists there mentioned and the testimony of the chemist Hoskins. Counsel asserts that this claim that palm oil is deleterious to health (brief, p. 12) is unfounded unless the *ex parte* statement of the Commissioner of Internal Revenue be regarded as evidence. The finding of that officer is in evidence (Cliff record, p. 9) and it is the finding

of an officer upon an official investigation while acting within the scope of his authority (section 14). This finding was made after investigation, with the aid of expert chemists provided by law, of the samples of palm oil submitted by Moxley, the manufacturer of the oleomargarine involved in this case; and we submit that that finding, under the law, is conclusive.

It is said the Government has overlooked the testimony of Professor de la Fontaine (Cliff record, p. 12). This witness states that palm oil "is quite as digestible as any other of the fats that we use for food," and that after being *refined* there would be no objection in using it in large proportions; but he understands the process of refining does away with most of the flavor and color, and that ultimately (not at present) refined palm oil will find its way on the market as a regular article of food; perhaps not in this country where we have lard in plenty and other fats, *but in other countries.* This is as much as to say that at present it has not found its way on the market as a *natural* ingredient of oleomargarine, but that in the future it may do so in countries where other fats are more expensive. I suppose he refers to east Africa, but we are not concerned with tastes and notions of hygiene there.

But the chemist Hoskins (Cliff record, pp. 10, 11) is not so sure about the wholesomeness and future use of palm oil. His statement is, that in his opinion "there is nothing deleterious or un-

wholesome in the use of palm oil in the proportion in which it was used in this formula"—that is, less than 1 per cent. That limitation implies that if used in a larger quantity it would be deleterious and unwholesome.

Referring to the works of the chemists, to which we have called attention, we find the following respecting palm oil (Lewkowitsch's "Chemical Anal. of Oils," 2d ed., p. 517):

> Palm oil is characterized by the *very* large amount of free fatty acids it contains. Even in the fresh state the proportion of fatty acids calculated as palmitic acid amounts to 12 per cent, and may, in older samples, reach as much as 100 per cent; in other words, the splitting up of the glycerides may become complete [that is, become acids]. I have found in a large number of commercial palm oils from 50 to 70 per cent of free palmitic acid. * * *
>
> The coloring matter of palm oil is bleached by exposure to air, or by heat, or by chemicals, such as chromic acid, etc. The two latter processes are adopted in practice for preparing bleached palm oil, which is almost colorless. By "chemical" bleaching the odor is destroyed, but it is not affected by heating to a high temperature. The coloring principle and the odor are not destroyed by saponification with alkalis or lime (candle manufacture); acid saponification, however (p. 746), destroys both.

See also Allen's "Chemical Organic Analysis," vol. 2, part 1 (3d ed.), page 161.

Apparently palm oil is more available as a material for soap and candles than for food.

From this it will be seen that the only proper way to refine the oil and render it wholesome is by chemical process. This destroys the odor *and the color* (the "desired" property) and perhaps takes away the offensive taste.

Evidently, then, the palm oil used in the oleomargarine involved in the Cliff case had not been refined in this proper sense, else it would not have imparted the color.

It seems useless to pursue the argument further. It is clear from the evidence and from the chemical authorities cited that palm oil in the condition in which it was introduced into this oleomargarine can not be regarded as a food product or as a natural or statutory ingredient of oleomargarine; and that, until chemically refined, at least, is unfit for human consumption. Having used only a sufficient quantity to give the product the "desired" color, the conclusion is irresistible that it was used solely for purposes of coloration and did not form, and was not intended to form, any part of the fatty ingredients; and that, therefore, such use constituted an artificial coloration within the meaning of the statute.

Mr. Harlan invokes the same authorities under the customs law which are quoted in Mr. Guthrie's

reply brief. If Mr. Harlan's argument were sound that on the test of the law itself palm oil is not an artificial coloration and therefore the Commissioner under his statutory authority can not decide contrary to the clear effect of the law, nor add anything to its terms, then his conclusion drawn from these decisions, that by a department regulation (or by executive decision) a law can not be contravened or enlarged, would be sound. But I submit that his conclusion falls with his premise, and that my comment (*ante*), on the decisions which are cited, embodies the true principle of this case, namely, that there is no defect or omission in the law which the taxpayer can legally take advantage of, and that the Commissioner is merely effectuating its plain terms and meaning and is not attempting through his finality of decision either to set the law aside, or to add to its scope, or to supply its omissions. He is doing nothing more than ascertaining facts under the law, and applying the law to the facts found.

Final suggestions.

Counsel, in reply to the suggestion from the bench that his argument against the constitutionality of any legislation which would destroy or greatly injure and embarrass a legitimate industry involves the necessity of contending that State legislation prohibiting or regulating the manufacture and sale of oleomargarine is unconstitutional, although this court determined otherwise

in the *Capital City Dairy* case, nevertheless maintained that proposition; and in seeking to illustrate it, and to enforce it, further claimed that even under the unlimited power over interstate commerce Congress could not prohibit an article from entering commerce and in that way injure or destroy its value or the business producing it. Is that proposition sound? And is it possible to maintain it in view of the decisions of the court? Of course there is a great difference between legitimate and illegitimate commerce, or between a legitimate and an illegitimate article of commerce. But the court has rendered no decision which would hamper the discretion of Congress in determining whether *any* particular article, whatever its character, should be excluded from commerce. At least it is certain that Mr. Guthrie's argument on this point necessitates the view that State legislation *prohibiting* the manufacture and sale of oleomargarine is unconstitutional.

The correlation between Federal and State powers which I endeavored to point out is this: The decisions of the court show that the Federal power must not encroach upon the State domain, nor the State power upon the Federal domain; that the State power of internal police must be left untrammeled by the one authority as well as the Federal power over interstate commerce, for instance, by the other; that the plain prohibitions respectively restraining either authority can not be evaded covertly or indirectly—such an *effect* of a

law is forbidden, whatever its guise; but that, along the line where the two powers approach each other, where under the particular facts the demarcation is not definite and clear, a *bona fide* exercise of power in either domain is not invalid because its consequences incidentally affect the other domain.

So in the *Plumley case*, for example, where, as in other State cases, the oleomargarine interests were urging the reverse of their proposition in this case and contending that the State law was a regulation of Federal commerce, the court approved the statement in *Sherlock* v. *Alling* (93 U. S., 99, 103), that legislation may affect commerce in many ways without constituting a regulation of it within the meaning of the Constitution, when the legislation is not directed against commerce and only indirectly and remotely affects it.

I suppose that principle applies to Federal legislation in its bearings upon *intra* State affairs and commerce as well as to State legislation in its effect upon *inter* State commerce.

In *Louisville and Nashville R. R.* v. *Kentucky* (161 U. S., 677) it was held that the State prohibition of certain railway consolidations was within the State police power. It was said that Congress would not have the power to authorize such consolidations in defiance of State legislation. Is there not a difference between such an authority or some prohibition similarly encroaching on State power, and a legitimate Federal law asserting a

Federal attribute or object, like a Federal tax command? The opinion in that case fully sustained the State police power when "invoked in good faith for the prohibition of a practice which the legislature has declared to be detrimental to the public interests." How do the present cases interfere with that principle? Is it true because State laws have been sustained as *not* constituting restraint or interference *quoad Federal* power, or because Federal statutes may unlawfully run into the State preserve, that *this* Federal *tax* law, actually following and aiding indirectly the universal policy and laws of the States, must be stricken down?

The actual situation must be recognized. In the case of a State law not antagonized but aided by the effect of a Federal tax law, or in the case of non-action by a State, can it be successfully urged that a dormant State power, possible to exert in opposition to the general tendency of legislation throughout the country and to the indirect effect of the Federal tax law, although not actually so exerted, can control a power of the Government created by the Constitution? In the present case the State police power is not dormant except in the sense that the States might reverse their existing oleomargarine policy. The State power is not dormant; it has acted; but could a dormant and potential local authority thus absolutely control the Federal power of taxation?

The *Knight* case held (156 U. S., 1) that a monopoly of *production* did not restrain interstate *commerce*. That was because production is a matter wholly reserved to State control, and for that reason the indirect effect upon commerce among the States could be ignored. I presume if the interstate-commerce power, also exclusive, indirectly affected production, its legitimate exercise would be valid none the less, and for the same reason. It was held to be valid where it thus affected the right of contract,—also a matter of State control, in the Trans-Missouri and Joint Traffic cases. (166 U. S., 290; 171 U. S., 505.)

In other words, the argument is correlative—a rightful power legitimately exercised, either in the national or State field, is not invalidated because it may somewhat affect another subject falling under the opposite authority.

Here both sovereignties have the particular power—that is, of taxation—and one, the State, has the peculiar and exclusive authority of internal police regulation. Is the Federal tax law invalidated because of an indirect effect upon the industry within the State, especially when the law falls in with the State regulation? The case is sharply contrasted with the situation as to liquor, where the Federal tax law does not recognize local prohibitions, but permits and authorizes the sale and issue of Federal licenses in States which have forbidden the traffic entirely.

In fine, there is nothing in the case but the assertion that the *amount* of the tax invalidates it. In connection with that claim I desire to recall to the court the terms of the grant of power, explicitly and exclusively (among all the grants) recognizing the object of general welfare, which therefore enforces the taxing grant in a peculiar sense. If this amount is too great to be constitutional, where and how shall the line be drawn?

One may readily quote from the great announcements of the court, or from the utterances of distinguished public men weighty truths regarding the objects of governments, the exercise of their powers, and the principles of constitutions. The doctrines for which the Government stands in this case are as solemn, as sound, and as completely established as any principles which this court has settled in construing the Constitution.

And so it is appropriate to recall to the court, as a comment upon Mr. Guthrie's argument and the grave words of his conclusion, the impressive language of Chief Justice Marshall at the close of the remarkable opinion which he delivered in *Gibbons* v. *Ogden:*

> Powerful and ingenious minds, taking as postulates that the powers expressly granted to the Government of the Union are to be contracted by construction to the narrowest possible compass, * * * may, by a course of well-digested but refined and metaphysical reasoning, founded on these premises,

> explain away the Constitution of our country, and leave it a magnificent structure, indeed, to look at, but totally unfit for use. They may so entangle and perplex the understanding as to obscure principles which were before thought quite plain, and induce doubts where, if the mind could pursue its own course, none would be perceived.

I respectfully submit that, regarding the constitutional question at least, and in the *McCray* case, if not in the Chicago cases, there is no objection on the score of jurisdiction; and that the judgments below should be affirmed.

HENRY M. HOYT,
Solicitor-General.

O

Supreme Court of the United States.

No. 301.—October Term, 1903.

Leo W. McCray, Plaintiff in Error, *vs.* The United States.	In error to the District Court of the United States for the Southern District of Ohio.

[May 31, 1904.]

The United States sued McCray for a statutory penalty of $50, alleging that, being a licensed retail dealer in oleomargarine, he had, in violation of the acts of Congress, knowingly purchased for resale a fifty-pound package of oleomargarine, artificially colored to look like butter, to which there was affixed internal revenue stamps at the rate of one-fourth of a cent a pound, upon which the law required stamps at the rate of ten cents per pound. The answer of McCray, whilst admitting the purchase of the package stamped as alleged, set up two defences.

First. It was averred that the oleomargarine in question was made by a duly licensed manufacturer, the Ohio Butterine Company, from a formula used by it in making a high grade oleomargerine composed of "the following ingredients and none other, in these proportions; oleo oil, 20 pounds; natural lard, 30 pounds; creamery butter, 50 pounds; milk and cream, 30 pounds; common salt, 7 pounds." It was asserted that whilst it was true that the oleomargarine made from the ingredients in question was of a yellow color, that this result was not caused by artificial coloration, but was solely occasioned by the fact that the butter which was bought in open market and used in making the oleomargarine had a deep yellow color imparted to it (the butter) by a substance known as Wells-Richardson's improved butter color. This preparation, it was averred, was not injurious to health, and was constantly used in the United States in the manufacture of butter made from pure milk or cream, for the purpose of imparting to it a deep yellow color. Averring that a yellow color produced in oleomargarine by the employment of butter, as an ingredient, which was artificially colored, did not amount to an artificial coloration of the oleomargarine within the meaning of the statute, it was asserted that the tax of one-fourth of a cent per pound was a compliance with the law.

Second. If the act of Congress imposing the tax, when rightly construed, required stamps at the rate of ten cents per pound upon oleomargarine, colored as described in the first defence, the act levying such tax was charged to be repugnant to the Constitution of the United States.

As a foundation for this defence the answer contained the following averments:

Whilst butter made from pure milk and cream in the spring season was of a deep yellow color, such butter when made at all other seasons was of a pale yellow; that the taste of consumers of butter in the United States required all butter to possess the deep color naturally belonging to butter made in the spring season, and hence it had come to pass that substantially all butter manufactured for sale in the United States, not made in the spring season and not naturally of a deep yellow, was colored artificially so as to cause it to have the deep yellow of spring butter. It was alleged that this deep yellow coloration of natural butter was universally produced by the use of either Wells-Richardson's compound or some other coloring ingredient, which did not change the taste of the butter, none of which were injurious to health. Oleomargarine, it was alleged, derived its chief value as an article of food as a substitute for butter, and that growing out of the taste of the consumers, unless the oleomargarine which was naturally white could be colored yellow, to present the appearance of butter artificially colored, there was no demand for it, and its manufacture and sale would be commercially impossible. It was then averred that to impose upon the colored oleomargarine a tax of ten cents per pound would burden it with such a charge as to render it impossible to make and sell it in competition with butter, and therefore the result of imposing a tax of ten cents a pound on oleomargarine when artificially colored would destroy the oleomargarine industry. From these averments it was charged that if the law imposed the tax of ten cents upon the oleomargarine in question the statute was repugnant to the Constitution, because it deprived the defendant of his property without due process of law; because the levy of such a burden was beyond the constitutional power of Congress, since it was an unwarranted interference by Congress "with the police powers reserved to the several States and to the people of the United States by the Constitution of the United States;" and further, that said acts of Congress were repugnant to the Constitution, since they finally lodged in an executive officer the power to determine what constituted artificial coloration of oleomargarine, and therefore invested such officer with judicial authority; and, finally, because the attempt by Congress to levy a tax at the rate of ten cents a pound arbitrarily discriminated against oleomargarine in favor of butter, to the extent of destroying the oleomargarine industry for the benefit of the butter industry, and was, therefore, violative of "those fundamental principles of equality and justice which are inherent in the Constitution of the United States."

The Government demurred to the answer on the ground that it stated no defence. The demurrer was sustained and McCray electing to plead no further, the court found the facts alleged in the petition to be true, and

adjudged that the Government recover "the sum of fifty dollars as a penalty and costs." Because of the questions arising under the Constitution, the case was then brought directly to this court.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

As the controversy in every aspect involves the acts of Congress concerning the taxation of oleomargarine, a summary of those acts becomes essential.

The original act was passed in 1886. (24 Stat. 209.) The first section provided:

"That for the purposes of this act the word 'butter' shall be understood to mean the food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter."

The second thus defined oleomargarine:

"That for the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine,' namely: All substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef fat, suet, lard, lard oil, vegetable oil, and annotto, and other coloring matter; intestinal fat and offal fat made in imitation or semblance of butter, or, when so made, calculated or intended to be sold as butter or for butter."

The third, fourth, fifth, sixth and seventh sections imposed a license on manufacturers and dealers in oleomargarine, and contained many requirements controlling the packing, marketing and supervision of the manufacture and sale of the taxed article. The eighth section provided as follows:

"That upon oleomargarine which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected a tax of two cents per pound, to be paid by the manufacturer thereof; . . . The tax levied by this section shall be represented by coupon stamps and the provisions of existing laws governing the engraving, issuing, sale, accountability, effacement and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section."

The other provisions of the statute, not necessary to be noticed, contained many regulations looking to the enforcement and collection of the licenses and taxes which the act imposed. In 1902 further provisions were made on the subject, and the act of 1886 was, in many respects, expressly amended. (32 Stat. 93.) The title of the act is—

"An act to make oleomargarine and other imitation dairy products subject to the laws of any State or Territory or the District of Columbia into which they are transported, and to change the tax on oleomargarine, and to impose a tax, provide for the inspection and regulate the manufacture and sale of certain dairy products, and to amend an act entitled 'An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomaragine,' approved August 2, 1886."

The first section provides that all—

"oleomargarine, butterine, imitation, process, renovated, or adulterated butter, or imitation cheese, or any substance in the semblance of butter or cheese, not the usual product of the dairy and not made exclusively from pure and unadulterated milk or cream, transported into any State or Territory or the District of Columbia and remaining therein for use, consumption, sale or storage therein, shall, upon the arrival within the limits of such State or Territory or the District of Columbia, be subject to the operation and effect of the laws of such State or Territory or the District of Columbia . . . to the same extent and in the same manner as though such article or substances had been produced in such State or Territory or the District of Columbia, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

Section 2 amends section 3 of the act of 1886 in particulars not necessary for the purposes of this case to be considered. Section 3 amends section 8 of the act of 1886 by increasing the tax on oleomargarine from two (2) to ten (10) cents per pound, with this proviso:

"*Provided*, When oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow, said tax shall be one-fourth of one cent per pound. The tax levied by this section shall be represented by coupon stamps; and the provisions of existing laws governing the engraving, issue, sale, accountability, effacement and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for in this section."

Section 4 reiterates the definition of butter contained in the first section of the act of 1886, and besides gives a definition of "adulterated butter," "process butter" or "renovated butter," and imposes taxes upon the manufacture and sale of these articles, the tax upon adulterated butter being at the rate of ten cents a pound.

The section in question as well as those following it contain many administrative provisions for the enforcement of the taxes levied by the act and concerning interstate and foreign commerce in the articles referred to. Bearing, then, the statutes in mind, we come to consider the assignments of error, which are as follows:

"The District Court erred in sustaining the demurrer of the United States to the answer of plaintiff in error (defendant below).

"The District Court erred in refusing to hold that the act of Congress approved August 2, 1886, as amended by the act of Congress approved May 9, 1902, is in contravention of the Constitution of the United States

of America and of the amendments thereto, and is illegal and void, for the reasons:

"(*a*) The act deprives the defendant of his property without due process of law.

"(*b*) The act is an unwarranted encroachment upon and an interference with the police powers reserved to the several States and to the people of the United States.

"(*c*) The act so arbitrarily discriminates against oleomargarine in favor of butter as to destroy the oleomargarine industry for the benefit of the butter industry in the United States, and is thus repugnant to those fundamental principles which are inherent in the Constitution of the United States.

"The District Court erred in holding, if said act be not in contravention of the Constitution of the United States, that oleomargarine, which contains no artificial coloration than that imparted to it by the use of butter which itself contains coloring matter and which therefore causes said oleomargarine to look like butter of a shade of yellow, is subject to a tax of ten cents per pound instead of a tax of one-fourth of one cent per pound."

It is to be observed that in the errors thus assigned no reference is made to the contention in the answer that the acts of Congress were void because conferring upon administrative officers the power to finally decide what constituted artificial coloration, such contention therefore may be put out of view. The errors relied upon embrace not only the contention that the act of Congress imposing the tax is repugnant to the Constitution, but also that the penalty was wrongfully enforced, because the one-quarter of a cent per pound which had been paid on the oleomargarine was the only tax to which it was liable under the act of Congress when rightly construed. As the presence of the constitutional question imposes upon us the duty of considering also the construction of the statute, we shall invert the order in which the errors have been assigned, and come to consider, first, whether the act of Congress, as properly construed, required on the oleomargarine in question a tax of ten cents a pound; and, second, if it did, whether such act is repugnant to the Constitution of the United States.

1st. *The construction of the statute.*

Leaving out of view the proviso to the eighth section of the act of 1886 as amended and re-enacted by the third section of the act of 1902, it is beyond question that a tax of ten cents a pound is imposed upon oleomargarine. As the product was admitted by the answer to be oleomargarine, it follows that it was subject to the tax of ten cents a pound, unless, by the proviso the oleomargarine was of such a character as to entitle it to the benefits of a lower rate of taxation. Now the proviso reads: "*Provided*, When oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow, such tax shall be one-fourth of one cent per pound." As it was admitted that the oleomargarine was of a

shade of yellow causing it to look like butter, and as it was also admitted that this shade of yellow had been imparted by an artificial coloring matter used to color the butter which formed one of the ingredients from which the oleomargarine was manufactured, it results, if the text of the statute be applied, that the oleomargarine was not within the proviso, because it was not free from artificial coloring matter causing it to look like butter. This necessarily follows, since the right to enjoy the lower rate of tax is made by the proviso to depend upon whether, as a matter of fact, the oleomargarine was free from artificial coloring matter, and not upon the mere method adopted for imparting the artificial color. As the oleomargarine in question was in fact not free from artificial coloration we think that a construction which would take it out of the general rule imposing the ten cent tax upon all oleomargarine, and bring it within the exception embracing only oleomargarine free from artificial coloration, would be not an interpretation of the statute, but a disregard of its unambiguous provisions.

But it is contended that, as section 6 of the act of 1886 defined oleomargarine, for the purposes of that act, to be "certain manufactured substances, certain extracts and certain mixtures and compounds, including such mixtures and compounds with butter," and as not only the act of 1886, but the act of 1902, defined butter, for the purposes of those acts, to mean "the food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter," therefore colored oleomargarine produced by using, as one of the ingredients of its manufacture, butter artificially colored must be treated as free from artificial coloration within the meaning of the act of 1902, and the deduction made is that, as the statute treats butter, both with or without artificial coloration, as a legitimate ingredient of oleomargarine, the use of an authorized ingredient did not cause the manufactured product to be other than oleomargarine within the statute. But the proposition goes further, and asserts that because butter, whether artificially colored or not, was an authorized ingredient of oleomargarine, therefore the finished product, in which either of these ingredients was used, was not only oleomargarine, but necessarily also was oleomargarine free from artificial coloration. This is an obvious *non sequitur*. As the benefit of the lower tax depended upon the absence from the manufactured product of artificial coloration, it follows that if in the manufacture an authorized ingredient, which was artificially colored, was used so as to artificially color the product whilst that product would be oleomargarine, it could not be oleomargarine free from artificial coloration within the intendment of the proviso. Nor is there force in the contention that the plain meaning of the statute is overcome by an amendment to which it was subjected. Before the amendment relied on, the proviso read as follows: "Provided, when oleomargarine

is free from coloration *or ingredient* that causes it to look like butter of any shade of yellow, said tax shall be one-fourth of one cent per pound." By the amendment the word ingredient was stricken out, thus leaving the proviso in the form in which it was enacted. The proposition is that the elimination of the word "ingredient" compels to the conclusion that wherever artificial coloration in the finished product of oleomargarine was produced by artificial coloration used in an authorized ingredient, that such coloration was not artificial within the statute. But this disregards the fact that butter, both when artificially colored and when not so colored, was made an authorized ingredient of oleomargarine. If then the word "ingredient" had not been stricken out, it might have given rise to the contention that the imparting of a yellow color to the finished product of oleomargarine by the use in its manufacture of spring butter of a natural yellow color would have caused the product oleomargarine to be artificially colored within the statute. As the manufacturer of oleomargarine was permitted to use either butter not artificially colored or butter so colored, the effect of striking out the word "ingredient" operated simply to render it certain that the finished product, even although of a yellow color, would be within the proviso where the color was imparted by an authorized ingredient not artificially colored. This overthrows the contention that the finished product, when not free from artificial coloration, must be treated as free from such coloration, because the color was derived from an artificially colored though authorized ingredient. We think, whilst the statute recognized the right of a manufacturer to use any or all of the authorized ingredients so as to make oleomargarine, and also authorized as one of the ingredients butter artificially colored, if the manufacturer elected to use such ingredient last mentioned, and thereby gave to his manufactured product artificial coloration, such product so colored, although being oleomargarine, was not within the exception created by the proviso, and therefore came under the general rule subjecting oleomargarine to the tax of ten cents a pound.

Nor do the other provisions of the act of 1902, as it is asserted, sustain the contention that artificially colored oleomargarine is to be treated as free from such coloration, because such color was imparted in its manufacture by the use of an artificially colored and authorized ingredient. The provision principally depended upon is section 2 of the act of 1902, which provides that any person who "sells, vends or furnishes oleomargarine for the use and consumption of others, except to his own family table, without compensation, who shall *add to or mix* with such oleomargarine any artificial coloration, . . . shall also be held to be a manufacturer of oleomargarine . . ." But this section relates only to the adding to or mixing artificial coloration with oleomargarine after its manufacture, and therefore does not even remotely support the proposition that, where in the process

of manufacture oleomargarine becomes artificially colored, it must be held not to be what it in fact is, that is, must be treated as free from artificial coloration, although such in fact is not the case.

Indeed, the context of the statutes, particularly the provisions as to adulterated and renovated butter in the act of 1902, harmonize with and thus add cogency to the construction which we have given to the provision concerning artificial coloration.

2d. *Did Congress, in passing the acts which are assailed, exert a power not conferred by the Constitution?*

That the acts in question on their face impose excise taxes which Congress had the power to levy is so completely established as to require only statement. (*Patton* v. *Brady*, 184 U. S. 619; *Knowlton* v. *Moore*, 178 Ib. 41; *Nicol* v. *Ames*, 173 Ib. 509; *In re Kollock*, 165 Ib. 536.)

The last case referred to (*In re Kollock*) involved the act of 1886, and the court, speaking through Mr. Chief Justice Fuller, said (p. 536):

"The act before us is on its face an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue."

We might rest the answer to the contention as to the want of power in Congress to enact the laws in question upon the foregoing cases. But in view of the earnestness with which the validity of the acts are assailed in argument and the assertion that the necessary effect of the amendment to the act of 1886 by the act of 1902 is to make both of the laws in question so peculiar as to cause them to be beyond the reach of the previous rulings of this court, we propose, to review and dispose of the propositions pressed upon us at bar as indubitably demonstrating that the acts in question were beyond the power of Congress to adopt.

The summary which follows embodies the propositions contained in the assignments of error, and the substance of the elaborate argument by which those assignments are deemed to be sustained. Not denying the general power of Congress to impose excise taxes, and conceding that the acts in question, on their face, purport to levy taxes of that character, the propositions are these:

(*a*) That the power of internal taxation which the Constitution confers on Congress is given to that body for the purpose of raising revenue, and that the tax on artificially colored oleomargarine is void because it is of such an onerous character as to make it manifest that the purpose of Congress in levying it was not to raise revenue but to suppress the manufacture of the taxed article.

(*b*) The power to regulate the manufacture and sale of oleomargarine being solely reserved to the several States, it follows that the acts in

question, enacted by Congress for the purpose of suppressing the manufacture and sale of oleomargarine, when artificially colored, are void, because usurping the reserved power of the States, and therefore exerting an authority not delegated to Congress by the Constitution.

(*c*) Whilst it is true—so the argument proceeds—that Congress in exerting the taxing power conferred upon it may use all means appropriate to the exercise of such power, a tax which is fixed at such a high rate as to suppress the production of the article taxed, is not a legitimate means to the lawful end, and is therefore beyond the scope of the taxing power.

(*d*) As the tax levied by the acts which are asssailed discriminates against oleomargarine artificially colored, and in favor of butter so colored, and creates an unwarranted and unreasonable distinction between the oleomargarine which is artificially colored and that which is not, and as the necessary operation and effect of the tax is to suppress the manufacture of artificially colored oleomargarine, and to aid the butter industry, therefore the acts are void. And with this proposition in mind it is insisted that wherever the judiciary is called upon to determine whether a power which Congress has exerted is within the authority conferred by the Constitution, the duty is to test the validity of the act, not merely by its face, or to use the words of the argument, "by the label placed upon it by Congress," but by the necessary scope and effect of the assailed enactment.

(*e*) Admitting that the power to tax as delegated to Congress by the Constitution as originally adopted was subject to no limitation except as expressed in that instrument, the amendments to the Constitution, it is urged, have imposed limitations on the taxing power not expressed in the original Constitution. Under this assumption it is insisted that the acts in question are void, because the burdens which they impose are repugnant to both the Fifth and Tenth Amendments. To the Fifth Amendment, because the amount of the tax is so out of proportion to the value of the property taxed as to destroy that property, and thus amount to a taking thereof without due process of law. To the Tenth Amendment, because the necessary operation and effect of the acts is to destroy the oleomargarine industry and thus exert a power not delegated to Congress, but reserved to the several States.

(*f*) Although, as a general rule, it be true that the power of Congress to tax, conferred by the Constitution, is unlimited, except as otherwise expressed in that instrument, and conceding, for the sake of the argument, that there is no express limitation either in the original Constitution or in the amendments thereto, by which the acts may be decided to be unconstitutional, nevertheless, it is urged, that, as the burdens which the acts impose are so onerous and so unjust as to be confiscatory, the acts are

void, because they amount to a violation of those fundamental rights which it is the duty of every free government to protect.

It is clear that these propositions in many respects not only reiterate in different forms of expression the same contention, but that they also so intermingle considerations which require separate analysis so as to cause it to be difficult to precisely determine their import. For instance, all of the propositions obviously rest not only on inferences drawn from the face of the acts, but also on deductions made from what it is assumed must have been the motives or purposes of Congress in passing them. To avoid confusion and repetition we shall consider these distinct contentions separately, and we hence come, first, to ascertain how far, if at all, the motives or purposes of Congress are open to judicial inquiry in considering the power of that body to enact the laws in question. Having determined the question of our right to consider motive or purpose we shall then approach the propositions relied on by the light of the correct rule on the subject of purpose or motive.

Whilst, as a result of our written constitution, it is axiomatic that the judicial department of the government is charged with the solemn duty of enforcing the Constitution, and therefore in cases properly presented, of determining whether a given manifestation of authority has exceeded the power conferred by that instrument, no instance is afforded from the foundation of the government where an act, which was within a power conferred, was declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust. To announce such a principle would amount to declaring that in our constitutional system the judiciary was not only charged with the duty of upholding the Constitution but also with the responsibility of correcting every possible abuse arising from the exercise by the other departments of their conceded authority. So to hold would be to overthrow the entire distinction between the legislative, judicial and executive departments of the government, upon which our system is founded, and would be a mere act of judicial usurpation.

It is, however, argued if a lawful power may be exerted for an unlawful purpose, and thus by abusing the power it may be made to accomplish a result not intended by the Constitution, all limitations of power must disappear, and the grave function lodged in the judiciary, to confine all the departments within the authority conferred by the Constitution, will be of no avail. This, when reduced to its last analysis, comes to this, that, because a particular department of the government may exert its lawful powers with the object or motive of reaching an end not justified, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been

abused. But this reduces itself to the contention that, under our constitutional system, the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department.

The proposition, if sustained, would destroy all distinction between the powers of the respective departments of the government, would put an end to that confidence and respect for each other which it was the purpose of the Constitution to uphold, and would thus be full of danger to the permanence of our institutions. As aptly said by the court, speaking through Mr. Justice Miller, in *Kilborn* v. *Thompson* (103 U. S. 168, p. 190):

"It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to governments, whether State or National, are divided into the three grand departments, the executive, the legislative and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these respective departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other."

It is, of course, true, as suggested, that if there be no authority in the judiciary to restrain a lawful exercise of power by another department of the government, where a wrong motive or purpose has impelled to the exertion of the power, that abuses of a power conferred may be temporarily effectual. The remedy for this, however, lies, not in the abuse by the judicial authority of its functions, but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power. This was aptly pointed out in *Champion* v. *Ames*, (180 U. S. 321,) where, speaking through Mr. Justice Harlan, it was said (p. 363):

"But if what Congress does is within the limits of its power, and is simply unwise or injurious, the remedy is that suggested by Chief Justice Marshall in *Gibbons* v. *Ogden*, when he said: 'The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.'"

The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted. As we have previously said, from the beginning

no case can be found announcing such a doctrine, and on the contrary the doctrine of a number of cases is inconsistent with its existence. As quite recently pointed out by this court in *Knowlton* v. *Moore*, (178 U. S. 41, 60,) the often quoted statement of Chief Justice Marshall in *McCulloch* v. *Maryland*, that the power to tax is the power to destroy, affords no support whatever to the proposition that where there is a lawful power to impose a tax its imposition may be treated as without the power because of the destructive effect of the exertion of the authority. And this view was clearly pointed out by Mr. Chief Justice Marshall in the passage from *Gibbons* v. *Ogden*, (9 Wheat. 1,) which was repeated in the passage from the opinion in *Champion* v. *Ames*, previously cited.

And the same doctrine has been again and again expounded. In the *License Tax Cases*, (5 Wall. 463,) referring to the extensive power of taxation possessed by Congress, and the express limitations found in the Constitution, it was said (p. 471):

"It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception, and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion."

In *Pacific Insurance Co.* v. *Soule*, (7 Wall. 433,) referring to the unlimited nature of the power of taxation conferred upon Congress, it was observed (p. 443):

"Congress may prescribe the basis, fix the rates, and require payment as it may deem proper. Within the limits of the Constitution it is supreme in its action. No power of supervision or control is lodged in either of the other departments of the government."

And after referring to the express limitations as to uniformity and articles exported from any State, it was remarked (p. 446):

"With these exceptions, the exercise of the power is, in all respects, unfettered."

In *Austin* v. *The Alderman*, (7 Wall. 694,) it was again declared (p. 699) "that the right of taxation, where it exists, is necessarily unlimited in its nature. It carries with it inherently the power to embarrass and destroy."

Yet again, in *Veazie Bank* v. *Fenno*, (8 Wall. 533,) where a tax levied by Congress on the circulating notes of State banks was assailed on the ground that the tax was intended to destroy the circulation of such notes, and was, besides, the exercise of a power to tax a subject not conferred upon Congress, it was said, as to the first contention (p. 548):

"It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is, therefore, beyond the constitutional power of Congress.

"The first answer to this is that the judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution."

True it is, as argued, that the opinion in that case rested the conclusion not alone upon the doctrine just quoted, but also upon the principle that Congress possessed the power to suppress the circulation of the notes of State banks as an incident to the authority concerning the currency delegated to Congress by the Constitution. But whilst this argument may weaken the authoritative force of the statement made in the case in question as to the want of power in the judiciary to examine into motive, it does not affect the persuasive and inherent force of the reasoning by which that view was sustained. Besides, the doctrine has since been affirmed.

In *Spencer* v. *Merchant*, (125 U. S. 355,) speaking through Mr. Justice Gray, it was said:

"In the words of Chief Justice Chase, condensing what had been said long before by Chief Justice Marshall, 'The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected.'"

In *Knowlton* v. *Moore*, (178 U. S. 241,) the cases which have been referred to, were approvingly cited, and the doctrine which they expressed was restated.

In *Treat* v. *White*, (181 U. S. 264,) referring to a stamp duty levied by Congress, it was observed (p. 268):

"The power of Congress in this direction is unlimited. It does not come within the province of this court to consider why agreements to sell shall be subject to the stamp duty and agreements to buy not. It is enough that Congress in this legislation has imposed a stamp duty upon the one and not upon the other."

In *Patton* v. *Brady*, (184 U. S. 608,) considering another stamp duty levied by Congress, it was again said (p. 623):

"That it is no part of the function of a court to inquire into the reasonableness of the excise, either as respects the amount, or the property upon which it is imposed."

It being thus demonstrated that the motive or purpose of Congress in adopting the acts in question may not be inquired into, we are brought to consider the contentions relied upon to show that the acts assailed were beyond the power of Congress, putting entirely out of view all considerations based upon purpose or motive.

1. Undoubtedly, in determining whether a particular act is within a granted power, its scope and effect is to be considered. Applying this rule to the acts assailed, it is self-evident that on their face they levy an excise tax. That being their necessary scope and operation, it follows that the acts are within the grant of power. The argument to the contrary rests on the proposition that, although the tax be within the power, as enforcing it will destroy or restrict the manufacture of artificially colored oleomargarine, therefore the power to levy the tax did not obtain. This, however, is but to say that the question of power depends, not upon the authority conferred by the Constitution, but upon what may be the consequence arising from the exercise of the lawful authority.

Since, as pointed out in all the decisions referred to, the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise. The proposition now relied upon was urged in *Knowlton* v. *Moore*, (178 U. S. 41,) and was overruled. In that case it was insisted that, although death duties were within the power to levy excise taxation, as the effect of their extreme enforcement would involve the power to destroy the right to the passage or receipt of property on the occasion of death—a subject within the exclusive control of the States—therefore death duties when imposed by Congress must be held to be unconstitutional. In considering this contention, after referring to the statement of Mr. Chief Justice Marshall, in *McCulloch* v. *Maryland*, that the power to tax involves the power to destroy, it was observed (p. 60):

"This principle is pertinent only when there is no power to tax a particular subject, and has no relation to a case where such right exists. In other words, the power to destroy, which may be the consequence of taxation, is a reason why the right to tax should be confined to subjects which may be lawfully embraced therein, even although it happens that in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope. But this reasoning has no application to a lawful tax, for if it had there would be an end of all taxation; that is to say, if a lawful tax can be defeated because the power which is manifested by its imposition may, when further exercised, be destructive, it would follow that every lawful tax would become unlawful, and therefore no taxation whatever could be levied."

Of course, where a State law is assailed as repugnant to the Constitution of the United States, and on its face such act was seemingly within the power of the State to adopt, but its necessary effect and operation is to usurp a power granted by the Constitution to the Government of the United States, it must follow, from the paramount nature of the Constitution of the United States, that the act is void. In such a case the result of

the test of necessary operation and effect is to demonstrate the want of power, because of the controlling nature of the limitations imposed by the Constitution of the United States on the States.

And without attempting to review the numerous authorities cited in the argument, it suffices to say that we think it is apparent that they fall within one or the other of the categories just previously stated.

2. The proposition that where a tax is imposed which is within the grant of powers, and which does not conflict with any express constitutional limitation, the courts may hold the tax to be void because it is deemed that the tax is too high, is absolutely disposed of by the opinions in the cases hitherto cited, and which expressly hold, to repeat again the language of one of the cases, (*Spencer* v. *Merchant,*) that "The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected."

3. Whilst undoubtedly both the Fifth and Tenth Amendments qualify, in so far as they are applicable, all the provisions of the Constitution, nothing in those amendments operate to take away the grant of power to tax conferred by the Constitution upon Congress. The contention on this subject rests upon the theory that the purpose and motive of Congress in exercising its undoubted powers may be inquired into by the courts, and the proposition is therefore disposed of by what has been said on that subject.

The right of Congress to tax within its delegated power being unrestrained, except as limited by the Constitution, it was within the authority conferred on Congress to select the objects upon which an excise should be laid. It therefore follows that, in exerting its power, no want of due process of law could possibly result, because that body chose to impose an excise on artificially colored oleomargarine and not upon natural butter artificially colored. The judicial power may not usurp the functions of the legislative in order to control that branch of the government in the performance of its lawful duties. This was aptly pointed out in the extract heretofore made from the opinion in *Treat* v. *White,* (181 U. S. 264.)

But it is urged that artificially colored oleomargarine and artificially colored natural butter are in substance and in effect one and the same thing, and from this it is deduced that to lay an excise tax only on oleomargarine artificially colored and not on butter so colored is violative of the due process clause of the Fifth Amendment, because, as there is no possible distinction between the two, the act of Congress was a mere arbitrary imposition of an excise on the one article and not on the other, although essentially of the same class. Conceding merely

for the sake of argument that the due process clause of the Fifth Amendment, would avoid an exertion of the taxing power which, without any basis for classification, arbitrarily taxed one article and excluded an article of the same class, such concession would be wholly inapposite to the case in hand. The distinction between natural butter artificially colored, and oleomargarine artificially colored so as to cause it to look like butter, has been pointed out in previous adjudications of this court. (*Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, and authorities there cited.) Indeed, in the cases referred to the distinction between the two products was held to be so marked, and the aptitude of oleomargarine when artificially colored, to deceive the public into believing it to be butter, was decided to be so great that it was held no violation of the due process clause of the Fourteenth Amendment was occasioned by State legislation absolutely forbidding the manufacture, within the State, of oleomargarine artificially colored. As it has been thus decided that the distinction between the two products is so great as to justify the absolute prohibition of the manufacture of oleomargarine artificially colored, there is no foundation for the proposition that the difference between the two was not sufficient, under the extremest view, to justify a classification, distinguishing between them.

4. Lastly we come to consider the argument that, even though as a general rule a tax of the nature of the one in question would be within the power of Congress, in this case the tax should be held not to be within such power, because of its effect. This is based on the contention that, as the tax is so large as to destroy the business of manufacturing oleomargarine artificially colored to look like butter, it thus deprives the manufacturers of that article of their freedom to engage in a lawful pursuit, and hence, irrespective of the distribution of powers made by the Constitution, the taxing laws are void, because they violate those fundamental rights which it is the duty of every free government to safeguard, and which, therefore, should be held to be embraced by implied though none the less potential guaranties, or in any event to be within the protection of the due process clause of the Fifth Amendment.

Let us concede, for the sake of argument only, the premise of fact upon which the proposition is based. Moreover, concede for the sake of argument only, that even although a particular exertion of power by Congress was not restrained by any express limitation of the Constitution, if by the perverted exercise of such power so great an abuse was manifested as to destroy fundamental rights which no free government could consistently violate, that it would be the duty of the judiciary to hold such acts to be void upon the assumption that the Constitution by necessary implication forbade them.

Such concession, however, is not controlling in this case. This follows when the nature of oleomargarine, artificially colored to look like butter, is recalled. As we have said it has been conclusively settled by this court that the tendency of that article to deceive the public into buying it for butter is such that the States may, in the exertion of their police powers, without violating the due process clause of the Fourteenth Amendment, absolutely prohibit the manufacture of the article. It hence results, that even although it be true that the effect of the tax in question is to repress the manufacture of artificially colored oleomargarine, it cannot be said that such repression destroys rights which no free government could destroy, and, therefore, no ground exists to sustain the proposition that the judiciary may invoke an implied prohibition, upon the theory that to do so is essential to save such rights from destruction. And the same considerations dispose of the contention based upon the due process clause of the Fifth Amendment. That provision, as we have previously said, does not withdraw or expressly limit the grant of power to tax conferred upon Congress by the Constitution. From this it follows, as we have also previously declared, that the judiciary is without authority to avoid an act of Congress exerting the taxing power, even in a case where to the judicial mind it seems that Congress had in putting such power in motion abused its lawful authority by levying a tax which was unwise or oppressive, or the result of the enforcement of which might be to indirectly affect subjects not within the powers delegated to Congress.

Let us concede that if a case was presented where the abuse of the taxing power was so extreme as to be beyond the principles which we have previously stated, and where it was plain to the judicial mind that the power had been called into play not for revenue but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests, that it would be the duty of the courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred. This concession, however, like the one previously made, must be without influence upon the decision of this cause for the reasons previously stated; that is, that the manufacture of artificially colored oleomargarine may be prohibited by a free government without a violation of fundamental rights.

Affirmed.

The CHIEF JUSTICE, Mr. Justice BROWN and Mr. Justice PECKHAM dissent.